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IN THE

Supreme Court of the United States

October Term, 1965.

No. 556

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

Appellants, The Pennsylvania Railroad Company *et al.*, listed in Appendix F hereto, p. 62a, *infra*, appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania, which dismissed their complaint to set aside an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court is set forth in Appendix A hereto, pp. 1a-8a, *infra*. The reports of the Interstate Commerce Commission are found at 318 I.C.C. 469 and 321 I.C.C. 738. These reports and accompanying orders are set forth in Appendices B and C respectively, pp. 9a-29a and 30a-56a, *infra*.

JURISDICTION

This action was begun by a complaint filed in the United States District Court for the Eastern District of Pennsylvania under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, praying that an order of the Interstate Commerce Commission be set aside. The judgment of the District Court, set forth in Appendix D, hereto, p. 57a, *infra*, was dated June 16, 1965 and entered on June 15, 1965. These Appellants filed their Notice of Appeal in the District Court on July 14, 1965. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. *Interstate Commerce Commission v. New York, New Haven & Hartford R. Co.*, 372 U.S. 744 (1963); *All States Freight, Inc., et al. v. New York, New Haven & Hartford Railroad Company, et al.*, 379 U.S. 343 (1965).

STATUTES INVOLVED

Sections 1(5), 3(1), and 15(1) of the Interstate Commerce Act, 49 U.S.C. § 1(5), § 3(1), and § 15(1), and sections 8(b) and 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1007(b) and § 1009(e) are printed in Appendix E hereto, pp. 58a-61a, *infra*.

The provision of the Interstate Commerce Act that is most particularly involved—§ 3(1)—reads:

> "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

QUESTIONS PRESENTED

This case arises from a proceeding before the Interstate Commerce Commission in which there were at issue the reasonableness of certain railroad rates for the transportation of fruits and vegetables from the Southern and Southwestern parts of the country to New York City, and the lawfulness of the relationship of those rates to lower rates from the same origin areas to points on the New Jersey side of the New York metropolitan district.

The Commission found the rates to be unduly prejudicial to New York and unduly preferential of the New Jersey points in violation of § 3(1) of the Interstate Commerce Act, and ordered that the New York and New Jersey rates be made equal. It also found the rates to New York to be unreasonable, in violation of § 1(5) of the Act, notwithstanding its finding that they were below the out-of-pocket cost of performing the service involved (App. C, pp. 36a and 40a).

The Court below did not consider the Commission's finding of unreasonableness. It rested its decision upholding the Commission's order entirely upon an affirmance of the finding of undue prejudice and preference (App. A, p. 8a).

The questions presented are these:

1. Whether, as a condition to its conclusion of undue prejudice and preference in violation of § 3(1) of the Interstate Commerce Act, the Commission was bound to find that transportation conditions to the alleged prejudiced point were substantially similar to those to the alleged preferred point.

2. Whether the Interstate Commerce Commission may lawfully equalize commercial conditions by requiring an equality of rates regardless of the extent of differences in transportation conditions.

3. Whether, in undertaking to determine the cost of normal delivery at New York, the Commission acted without evidence.

4. The Commission having found lawful the inclusion of extraordinary services or privileges in the freight rates to the pier stations in New York, did it act lawfully in excluding the cost of such services and facilities in determining whether the said freight rates are unduly prejudicial and preferential in relation to rates to the New Jersey points involved?

5. Is the order of the Commission under review free of errors of law, supported by substantial evidence and by adequate findings of fact and statements of the reasons and basis for the Commission's decision?

STATEMENT

Origin and Nature of the Proceedings Before the Interstate Commerce Commission

The proceedings before the Commission were initiated by a complaint, filed jointly by the Port of New York Authority and the City of New York, which brought in issue rates which are higher to New York City than to nearby New Jersey points, and which applied for the transportation of citrus fruits from Florida, peaches from the Southeast, and vegetables from Florida, the Southeast and the Southwest.

Although the rates on citrus fruits are of far greater importance than the other rates from the standpoint of both volume of movement to New York and revenue involved, for the purpose of defining and deciding the ultimate issues, the reports of the Commission and the opinion of the Court below referred principally to the rates on vegetables from Florida. In the interest of continuity this course will be followed here.

The financial situation of the Eastern Railroads has been critical in recent years. Their rates of return on net investment in transportation properties have been near the vanishing point (Ex. 66).* That of the Pennsylvania, which is the principal carrier in the transportation with which this case is concerned, was 0.49% in 1958 and 1.27% in 1959, the last two years shown of record (Ex. 66, p. 2). One of the great problems of the railroads lies in the tremendous increase in terminal costs that has occurred during the inflationary period which began with World War II. Thus, the terminal costs of the Eastern District railroads (roughly those operating east of the Mississippi and north

* Figures preceded by "Ex." refer to exhibits in the record before the I.C.C., which was received in evidence in the court below (R. 209). Figures preceded by "Tr." refer to pages of the transcript of testimony in said I.C.C. record. Figures preceded by "R" refer to the numbered pages of the record in the court below.

of the Ohio and Potomac Rivers) have increased 439% since 1939, while line-haul costs have increased only 91% (Ex. 68).

The Pennsylvania transports, as terminal carrier, by far the greatest proportion of fruit and vegetable traffic shipped from the South to the New York area (Tr. 381). In 1957 when that line and the Baltimore & Ohio were approached to join in reducing rates on Florida vegetables to meet truck competition, they agreed to do so only upon condition that the new rate would give some recognition to their higher terminal costs at New York City, specifically that the rates to New York would be higher than those to Jersey City by $57.00 per car.

The proposal for the $57.00 differential was agreeable to the Southern railroads, which originated the traffic, to the shippers in the South (Tr. 418, 323), and to the fruit and vegetable receivers in the New York area (Tr. 418, 323). Accordingly, reduced rates from Florida to the Northeastern part of the country were put into effect, with the $57.00 per car differential to New York City.

Following this rate adjustment from Florida, tariffs carrying a similar basis were published, successively, from the remainder of the Southeast and from the Southwest. The Port of New York Authority petitioned the Commission to suspend and investigate these latter rates, but the produce trade at New York opposed the petitions and informed the Commission that the Port Authority did not speak for them, and the Southwestern shippers insisted that the Port Authority "leave our satisfactory arrangements alone" (Exs. 58, 59). The Commission denied the Port Authority's petitions to suspend the rates.

About a year and a half after the establishment of the rates from Florida, the Port of New York Authority and the City of New York filed their complaint alleging that the rates to New York City were unreasonable and, in relation to the rates to the New Jersey points, unduly prejudicial to New York and unduly preferential of the New Jersey points involved. Following hearings before an Ex-

aminer and the issuance by him of a report adverse to the railroads, Division 2 of the Commission handed down its report (App. B, pp. 9a-29a, *infra*), dismissing the complaint upon a finding that the rates had not been shown to be unlawful.

With respect to the Complainants' principal point, that the higher rates to New York than to New Jersey destinations departed from a long-standing tradition of rate equality for all points in the "New York rate group" (which included the New Jersey points involved), the Division stated (App. B, p. 15a) that:

> "Although the voluntary action of railroads in maintaining rate uniformity on long-haul traffic destined to the New York-New Jersey metropolitan area has been approved notwithstanding the cost differences involved in effecting delivery to the various stations, it does not necessarily follow that the railroads should be compelled to continue the tradition of uniformity."

It also found that the rates at issue failed to cover the out-of-pocket cost of performing the transportation service to which they applied and that other considerations were not convincing that such rates were unreasonable in violation of § 1(5) (App. 16a-17a).

On the issue of undue preference and prejudice, it found (1) that the Complainants' evidence regarding undue prejudice to New York receivers was presented mainly by three commercial witnesses, none of whom was able to show that he had been adversely affected by the rate relationship involved and that "the vague and general declarations made as to competition and injury fail to show that complainants have been unduly prejudiced by the difference in rates and charges" (App. B, p. 19a), (2) that a desire to relocate the Washington Street Market (which is the principal produce market in New York and is near the Pennsylvania's produce terminal—Piers 27, 28 and 29 in lower Manhattan) has been under consideration for a great many years and does not appear to have been prompted

by the differences in the rates in issue, and (3) that in view of the considerable cost difference between delivering produce in New Jersey as compared with the New York piers, where the railroads provide many other services, the rates could not be found unduly prejudicial and preferential (App. B, p. 21a).

One Commissioner dissented. He agreed with the majority's conclusions that the rates were not shown to be unreasonable, or unduly prejudicial to "persons" in New York and unduly preferential of persons in New Jersey. But he found that the "public and private interests involved" are entitled to have a decision as to the relocation of the Washington Street Market made in accordance with the long-standing tradition of rate equality (App. B, pp. 23a-24a).

Pursuant to petitions for reconsideration, the case was reopened and on February 5, 1964 the Commission served its final report (App. C, pp. 30a-56a). Upon the ground of maintaining uniformity of rates throughout the New York metropolitan area, in order that the City of New York might be free to select a site for a new produce market on the basis of equality of transportation charges with New Jersey points, the Commission found that the rates were unreasonable, and unduly prejudicial to New York and unduly preferential to New Jersey points having the lower rates. Five Commissioners joined in the majority report, one concurred in the result and four dissented.

The majority found the rates unreasonable even though they agreed that they were below out-of-pocket costs (App. C, p. 40a). It stated (App. C, p. 40a) that in *B. & O.R. Co. v. U.S.*, 345 U.S. 146 (1953) this Court held that as long as rates as a whole afford just compensation for all carrier services to the public, the Commission was not barred from fixing non-compensatory rates for carrying some commodities. But the Commission did not rely on that theory here. The record as to earnings from overall operations would not have permitted it to do so. Instead, for its finding of unreasonableness, it relied upon the discredited doctrine

of relative unreasonableness, a phraseological form branded a "subterfuge" in the leading work on the Interstate Commerce Act, Sharfman, *The Interstate Commerce Commission*, Vol. III-B, p. 653. Indeed, within eight days of the date upon which the Commission decided the case here under review, it reaffirmed its earlier condemnation of the relative unreasonableness doctrine. This was by a unanimous commission; *Southeastern Assn. of R. & Util. Commrs. v. A.T. & S.F. Ry.*, 321 I.C.C. 519 (1964).

The Commission's order required that the rates to New York and New Jersey be equalized, either by reducing New York or increasing New Jersey, or by an adjustment of rates to both points. It gave no consideration to whether the rates (which had been established to meet truck competition) could, realistically, be increased.

The majority of the Commission agreed with Division 2 that undue prejudice had not been shown to produce receivers—"persons"—at New York, and that under the ordinary rule there was also no undue prejudice shown to New York City as a locality (App. C, p. 47a). It concluded, however, that its powers under § 3(1) should be exercised so that the decision as to relocation of the Washington Street Market can be made in accordance with the tradition of rate equality which, it said, has existed for more than a century (App. C, p. 48a). As stated by the City of New York in its brief in the lower court (R. 427), the Commission's conclusion of undue prejudice

> ". . . was bottomed upon the disadvantage of New York City, as a locality, in competing with municipalities in the same commercial and urbanized metropolitan area for the relocation of the fresh fruit and vegetable market."[1]

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1. With reference to the majority's apprehension that unless the rates were made equal, New Jersey might build a produce terminal because of its rate advantage and "Thus, if New York City should be adversely affected by the rate handicap, the Commission would be

It is implicit in the Commission's decision that regardless of where in the city the New York authorities decide to locate a new produce terminal the rates thereto must be the same as those to the New Jersey points involved. No matter how much more costly transportation to the new and unknown point might be than transportation to the Jersey side, under the Commission's theory and decision, there must be equality of rates.

The principal delivery point in New Jersey is the so-called Ballground Yard of the Pennsylvania Railroad (App. B, p. 13a), a facility also referred to as "Henderson Street, Jersey City". This was found by the Commission to be a "representative point" among the New Jersey points alleged to be preferred (App. C, p. 37a). With respect to New York City, Division 2 had found that practically all of the evidence of record related to movements to Piers 27, 28 and 29—the Pennsylvania's Produce Terminal, which is used also by the Erie-Lackawanna—and that this was submitted as representative (App. B, p. 13a). The final report stated that most of the evidence of record related to the delivery of freight at those piers (App. C, p. 33a).

Since the line-haul transportation to both New York and New Jersey points in the New York metropolitan area is the same, the difference in costs occurs in performing the terminal service involved in making deliveries to the New Jersey and New York points. The delivery of perishables

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unable under section 3(1) to undo the damage" (p. 48a, *infra*), the New York City authorities apparently thought so little of the rate disadvantage that they quite obviously began the construction of a $38 million wholesale market at Hunt's Point at a time when the rate differentials were in existence and their lawfulness affirmed by the unreversed decision of Division 2. This is manifest from the fact that counsel for the City stated at the hearing on the application for a temporary restraining order before the Court below that a wholesale market was "in the process of being constructed today at Hunt's Point" at a cost of $38 million (R. 105). This was on March 6, 1964, only about one month after the service of the decision of the entire Commission on February 5, 1964. It is hardly possible that the decision to embark upon a $38 million project, the letting of contracts therefor and the undertaking of construction could have been accomplished within a period of one month.

destined to the representative New Jersey point of Henderson Street Yard, Jersey City, is accomplished by a switching movement from the yard at which the road train is broken up to the team tracks in the adjacent Henderson Street Yard. In addition, deliveries at this point (as at all others) include station expenses.

Deliveries to the P.R.R.'s Manhattan produce terminal, Piers 27, 28 and 29, are made by switching the cars from the Jersey City yard at which the road train is broken up, to a float-bridge, the operation of moving cars over the float-bridge onto carfloats, and then the marine operation of "floating" the carfloats (by means of tugs) across the Hudson River and tying them up at the piers which constitute the produce terminal in lower Manhattan. In addition to those elements of service, station costs are incurred (App. B, p. 13a; App. C, pp. 32a, 33a, 36a, 37a, 38a).

At the piers, produce is displayed and sold, by auction or otherwise (App. C, p. 33a). Then the produce is removed by the buyer from the pier.

The evidence showed that the cost of making delivery at Piers 27, 28 and 29 exceeded by $63.25 per car the cost of delivering produce at the representative New Jersey point, Henderson Street team tracks—Jersey City (Exs. 64, 70 and 82). This compares with differences in the rates in issue as follows:

	Per Car
Cost Difference	$63.25
Rate Differences, New York over New Jersey	*Per Car*
Melons from Southwest	$33.00
Oranges from Florida	44.32
Peaches from Georgia	45.38
Vegetables from Texas	44.00
Vegetables from Florida and Southeast	57.00

Derived from Exs. 21, 19, 17 and 65. Where rates are published in cents per 100 lbs., conversion to amounts per car is on basis of average per car weights, and rate differences are calculated from representative origin points.

The Commission in no way disputed the accuracy of the cost difference of $63.25 per car, which resulted from a comparison of switching and station costs for the Jersey City deliveries with switching, float-bridge, floating and station costs for the New York pier deliveries (Ex. 82). Without evidence, it split the station costs at the New York Piers between what it regarded as normal station expenses and extraordinary expenses, the latter relating to the privilege of display and sale of the produce on the pier floors; a privilege which the Commission found lawfully to be included in the line-haul rate (App. C, pp. 37a and 38a). It disregarded a cost difference of $14.14 (the difference in the cost for switching cars from the terminal yard of the line-haul train to the Jersey City team tracks, on the one hand, and the switching, float-bridge and floating costs to Piers 27, 28 and 29 in New York, on the other), on the ground that differences of that degree may be found as between stations in any large rate group (App. C, p. 38a). It disregarded without explanation an additional difference of $12.29 between station costs at Henderson Street, Jersey City, and what it arbitrarily assigned as station costs for normal delivery at the New York Piers (App. C, p. 37a). It implied that higher rates to the New York stations could not be justified on the basis of higher costs unless they were for services and facilities which "differ in kind" from those provided at Jersey City (App. C, p. 38a).

After stating (App. C, p. 38a) that a difference of $14.14 per car may be found as between stations in any large rate group, the Commission stated that furthermore the cost of providing extraordinary services and facilities at Piers 27, 28 and 29 affords no justification for the imposition of higher rates and charges at other New York stations where no such pier services are performed. In this connection it may first be noted that, "most" (App. C, p. 33a) or "practically all" (App. B, p. 13a) the evidence related to the delivery of perishable freight at Manhattan Piers 27, 28 and 29. No attempt was made by the Complainants be-

fore the Commission to show competition and injury (from the rate relationship involved) with respect to the miscellaneous stations in New York, although this is essential to a conclusion of undue preference and prejudice. *I.C.C. v. Chicago Great Western Ry.*, 209 U.S. 108, 123 (1908); *Cudahy Packing Co. v. Atchison, T. & S.F. Ry. Co.*, 234 I.C.C. 569, 575 (1939). The City's testimony dealing with the possible loss of taxes and employment in New York (Tr. 164-5) was rejected as proof of undue preference and prejudice even by the Commissioner who wrote the majority opinion. (See his dissent to Division 2's report (at p. 22a, App. B)).[2]

The case thus presented by Complainants was then met by, *inter alia*, cost evidence relating to Piers 27, 28 and 29. If the Complainants had endeavored to make out a *prima facie* case of undue prejudice with respect to the miscellaneous stations in New York City, the railroads would have met that case by cost evidence or by any other kind of evidence that might have been needful. To have required the railroads to incur the expense of making cost studies at some 25 miscellaneous stations in New York without any evidence of competition between those stations and the New Jersey stations and, in the light of the Commission's decision, without any evidence that the City was planning to locate its new produce market at one of them (and, if so, which one), would have been arbitrary in the extreme. The representatives of the City of New York could not state where the new produce terminal would be located (Tr. 171). Plainly, therefore, the railroads could not have compared costs in serving the new terminal with costs at a typical New Jersey point.

Moreover, the Commission struck down the rates, not only to the miscellaneous stations, but also those to Piers

2. The only attempt to relate the possible removal of the Washington Street Market to New Jersey to the rate structure was based upon a proffered newspaper article, as to which an objection was sustained, the City's witness having been unable to stand cross-examination thereon (Tr. 167-8).

27, 28 and 29, the produce terminal of the Pennsylvania, to which, of course, the costs were shown. Indeed, it struck down rates to the pier stations in New York even where those stations were the only New York stations as to which there was a differential, New York over New Jersey (i.e., rates on vegetables and melons from the Southwest (Tr. 71-72)). It is clear that the Commission was not interested in cost differences. It was interested in equalizing commercial conditions as between New York and the New Jersey points regardless of the difference in transportation costs.

Proceedings in the Court Below

Upon challenge in the Court below by the Pennsylvania and thirteen other railroads, the order was sustained on the basis of permitting the Commission to preserve the integrity of the New York rate group. The Court did not deal with the absence of a finding of similarity of transportation conditions as between New York and the New Jersey points, with the Commission's having acted without evidence in attempting to split the cost of the New York Produce Terminal, or other principal points raised by Plaintiffs. It speculated that there were alternatives by which carrier revenue might be preserved and yet the group rate kept intact. The Court's determination rests entirely upon its conclusion that the finding of undue prejudice and preference supports the Commission's order. It found it unnecessary to consider the validity of the finding of unreasonableness (App. A, p. 8a).

Throughout its opinion (App. A, pp. 1a, 3a, 5a, 8a), the Court below dealt with the rates to New York as increased rates. This was erroneous. They were reductions (Tr. 310, Ex. 50, p. 21).

The effectiveness of the Commission's order was stayed by a temporary restraining order and an interlocutory injunction, followed by an order of the Commission effecting an indefinite postponement.

The Questions Presented Are Substantial

If the Commission's decision is not set aside, the requirements of the basic anti-discrimination provisions of § 3(1) of the Interstate Commerce Act forbidding undue preference and prejudice will have been changed, in a fundamental way, from those which have existed since the enactment of the Act to regulate commerce in 1887. It has been held from the beginning that undue prejudice is not shown by a mere inequality of rates, and that to sustain an allegation of undue prejudice it must also be shown, *inter alia*, that transportation conditions to the point alleged to be preferred are substantially similar to those to the point alleged to be prejudiced. *United States v. Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *New York v. United States*, 331 U.S. 284, 315-316, 350 (1947); *State Corporation Comm'n of Kansas v. United States*, 184 F. Supp. 691, 698 (1959); *Live Stock from Idaho Destinations*, 226 I.C.C. 225, 230 (1938); *Bituminous Coal, Tenn., Ky. & Va. to N.C., Tenn. & Va.*, 325 I.C.C. 548 (1965). The rule, as stated in *United States v. Illinois Central R.R., supra*, at p. 524, is that:

> "To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

In this case, the Commission made no finding that conditions of transportation to New York City were substantially the same as those to the New Jersey points alleged to be preferred. The difficulty is not merely the absence of a formal finding that transportation conditions were substantially similar; as a matter of substance the Commission's report does not show a conclusion that conditions were substantially similar. Indeed, the decision did not pretend that the conditions were substantially alike.

Rather, the majority clearly implied that it would pay no attention to cost differences for services which do not differ "in kind" (App. C, p. 38a). Moreover, the matter of permitting the City of New York to relocate the Washington Street market at any place it might choose in the City of New York, which was the consideration that controlled the Commission's decision is, inherently, one which would exclude consideration of comparative transportation conditions. The location of the new market place was, of necessity, unknown. The method of effecting delivery thereto and the facilities required therefor were unknown. Indeed, one of the counsel allied with the parties desiring rate equality objected to questions concerning transportation to Hunt's Point (since selected as the site for the new produce terminal) (R. 105) on the ground that such testimony would be irrelevant and immaterial because it related to a possible movement to a possible market which had not yet been established and that the case was not concerned with markets that may be established but with the lawfulness of the existing rates (Tr. 396). Likewise, counsel for the City of New York objected to a question concerning transportation conditions in reaching Hunt's Point, stating that the question was immaterial and that the issue was not whether the market should be moved to New Jersey or to Hunt's Point (Tr. 397).

It is thus clear that the record would not permit of any finding that conditions relating to transportation to the unknown point at which a new produce terminal might be located are substantially similar to those to a typical point in New Jersey. And, of course, no such finding was made.[3]

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3. The importance attached by this Court to the element of cost differences in applying anti-discrimination provisions is well illustrated by the decision in *I.C.C. v. Mechling*, 330 U.S. 567, at 577: "Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain."

The fact that rates on long-haul traffic generally have been the same to the New Jersey points involved as to points in New York City does not dispense with the necessity of a finding of substantial similarity of transportation conditions as a prerequisite to a conclusion of undue preference and prejudice. It should be observed that the statutory provisions involved are the requirements that rates be reasonable and that they be free of undue preference and prejudice. The Act imposes no requirement that the rates be grouped or that groups be maintained. To "group" a rate to one point with those to other points means simply to publish the same rate to the first point as to the others. Of course, it may be that in a given case, the facts and circumstances with respect to the first point are so like those applying to the other points that a valid conclusion of undue prejudice can be made if the rate to the said first point is higher than that to the others. But, to be valid, such a conclusion must be supported by the basic finding that circumstances and conditions are, in fact, substantially similar. And it cannot be assumed from the fact that a group exists, that conditions to a new major produce market in New York—now revealed to be a $38 million undertaking (R. 105)—will be such as to permit of transportation at approximately the same cost as to points on the Jersey side, especially in dealing with rates on a level as low as those here in issue.

Competition with other modes of transportation has required railroads to make rates on very low levels and where this is required the necessity for reflecting cost differences in rates assumes great importance. A carrier may be able to meet competition at one point within an area but its costs may prohibit its doing so at other points which have historically enjoyed the same rates as the first-mentioned point. In these circumstances, to impose the requirement of rate equality regardless of substantial dissimilarity of transportation conditions would shut the car-

rier out of competing for business where it can compete, because of the necessity of adhering to a tradition of rate equality which, in such instance, would have no relation to present economic facts. One brief submitted in support of the Commission's order in the Court below made the point that rate uniformity in the New York group resulted from competition of the railroads with the Erie Canal and with each other (R. 487). If there is to be imposed upon carriers serving New York with extremely low levels of rates on fruits and vegetables a blind adherence to a tradition of rate equality to preserve something that was required by the Erie Canal, there is not much hope left for the railroads.[4] As Professor Sharfman, paraphrasing Commissioner Eastman observed, " 'respect for old age . . . may be some excuse' for objectionable adjustments, but does not necessarily provide 'a reason' for maintaining them." *Sharfman, The Interstate Commerce Commission, III B, p. 685.*

In the very decision which is the foundation stone of the case now presented by the Port Authority and City of New York, the Commission prophetically foresaw the situation which in fact confronts Appellants today. It stated in the *New York Harbor Case,* 47 I.C.C. 643, at 735 (1917):

> "Although it is probable that the time will soon come when the carriers will find it necessary to accord adequate recognition in the rate structure to the heavy and ever-increasing expense of terminal operation, it can not be said at the present time that their failure to do so leads necessarily to the conclusion that their rates are unduly prejudicial or otherwise unlawful."

4. The Erie-Lackawanna and the New York Central Railroads favored equality of charges, New York versus Jersey City, in the case before the Commission. This position may well have been dictated by the position of these carriers in the port differential controversy that was then pending and in which it would have been against the interests of these lines which predominantly serve New York, among the ports, to have shown their high costs in New York Harbor. They introduced no evidence in the proceeding here under review.

Yet under the present decision equal rates are imposed without regard to comparative operating expenses. A finding of substantial similarity of transportation conditions to the point alleged to be unduly prejudiced and those alleged to be preferred was, in the very nature of the anti-discrimination concept of § 3(1), essential to the Commission's order; and it was required also by § 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b). But such a finding was not made.

Special Importance of Condemning the Commission's Having Acted Without Evidence in This Case.

As stated above, an important element of the Commission's decision in this case was its purported division of the station expenses at Piers 27, 28 and 29 between what it called normal delivery and extraordinary pier delivery costs (App. C, p. 39a). This split of the expenses was made entirely without evidence. A division was not even attempted by any party; there was no reason to make it, because the line-haul rate included the so-called extraordinary services and facilities, and the Commission expressly found this to be lawful (App. C, p. 38a).

The split made by the Commission appears in the Appendix to its report (App. C, *infra*, pp. 53a-56a). Reference thereto will show that the effort of the Commission was to arrive at an "estimate of what is delivery cost at the New York piers and cost of normal station services . . ." (App. C, p. 53a). The criterion for the cost of "normal station services" was the Commission's speculation, with no evidentiary support whatever, of the cost of making team track delivery. The Appendix shows that time after time the Commission sought to determine what the equivalent of individual items of expense would be in making "team track delivery" (App. C, pp. 54a, 55a). It is true that the facilities at Piers 27, 28 and 29 exceed those provided at an

ordinary freight station. But making delivery by floating cars across the river to Manhattan, then taking the cars off the floats over a float bridge, and switching them to team tracks, after which station expenses for team track delivery would occur, is far different and far more costly than making a delivery at what the Commission apparently visualized as an "ordinary team track". Thus the record shows that, in another I.C.C. case, the Port of New York Authority hired the famous engineering firm of Ford, Bacon & Davis to show what the cost of team track delivery would be in Manhattan if this method of delivery were substituted for pier deliveries of fruits and vegetables; and the firm arrived at a cost of $147.30 per car (Tr. 760-761). This compares with the cost found by the Commission for the representative New Jersey point, Henderson Street team tracks, of $49.09 per car (App. C, pp. 36a and 37a), a cost difference of $98.21 per car. This serves to indicate the danger and unfairness of the Commission's having determined station expenses for normal team track delivery at New York without the benefit of evidence on the subject.

It need only be added that the arbitrary nature of the apportionment made by the Commission is evident in every paragraph of the Appendix to its report. Time after time it says that there is no evidence upon which to make an apportionment, and then goes on to put down a figure arbitrarily. For example, as to the major item of pier rental (the piers being rented from the City of New York), it is stated in the Commission's Appendix (App. C, p. 55a):

> "On the basis that the pier portion of this facility corresponds to team track delivery and the shed portion to delivery peculiar to the New York service, the rental cost is assigned equally to these services."

In acting without evidence as to basic facts such as these, the Commission obviously acted in a most improper fashion.

Its apparent consideration of arbitrarily derived expenses for "normal delivery" as representing what the delivery expense would be at a new produce terminal market is wholly arbitrary.

"A finding without evidence is arbitrary and baseless." If action such as this could be sanctioned, it "would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat." *I.C.C. v. Louisville & N.R. Co.*, 227 U.S. 88, 91 (1913). That is precisely what it did here.

This action of the Commission, therefore, is contrary to the principles long ago established by the decisions of this Court, contrary to the requirement of § 15(1) of the Interstate Commerce Act that an order such as that here under review be made only "after full hearing", and contrary to § 5 of the Administrative Procedure Act. Under § 10(e) of that Act the Court below was bound to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . . (5) unsupported by substantial evidence . . ."

The importance of enforcing these requirements in any case is manifest. The public importance of enforcing them in the context of the present case is indicated by the fact that today's intensive competition among the several modes of transportation and within the individual modes themselves has called for more scientific ratemaking procedures, which have been supplied by the development of methods of determining transportation costs which are so widely used that "it is no exaggeration to say that cost-finding is now the foundation of transportation pricing"; Freas, *Role of Cost in Determining Transportation Charges*, Vol. XXI, I.C.C. Practitioners Journal, pp. 803, 804. If this principal factor upon which administrative action is thus so widely rested is to be established, as in this case, by conjuration out of thin air, rather than on the basis of evidence, a grave danger is manifest.

Conclusion

For the foregoing reasons probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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September 10, 1965

APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Plaintiffs* v. UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 35250 (Filed: June 15, 1965)

Argued December 7, 1964

Before: HASTIE, *Circuit Judge;* and BODY and HIGGINBOTHAM, *District Judges.*

OPINION OF THE COURT

(Filed May , 1965)

By HASTIE, *Circuit Judge.*

This action by several railroads seeks judicial invalidation of an order, issued by the Interstate Commerce Commission under sections 1(5) and 3(1) of the Interstate Commerce Act. In substance, the order requires the plaintiffs to cease, desist and abstain from charging new and increased rates for long haul shipments of fresh fruits and vegetables from the southern and southwestern areas of the country to stations in New York City, which are higher than their rates applicable to transportation from the same points of origin to northern New Jersey stations. *Port of N.Y. Authority v. Aberdeen & Rockfish R.R.*, 1964, 321 I.C.C. 738, 755.

The affected New York and New Jersey stations are all within a single metropolitan area and heretofore have constituted a rate group within which there has been parity of long haul rates. The long haul concept is limited to transportation over distances greater than 150 miles. The disputed order neither fixes rates nor precludes any increase or decrease of group rates. It merely invalidates a newly created rate differential between different destinations within the metropolitan area.

The order is based upon an accompanying report wherein the Commission has found that the new rate differential unjustifiably disrupts the integrity of a long-established rate group and, therefore, is both "unjust and unreasonable", within the meaning of section 1(5) of the Interstate Commerce Act, and "unduly preferential" to the New Jersey area and "unduly prejudicial" to the New York area, within the meaning of section 3(1) of the Act.

The new tariffs involved in this case have the effect of splitting the New York rate group into two rate areas, one of which includes some 100 stations in New Jersey and the other, some 25 stations in New York.[1] Before this innovation, group rates for shipments of various vegetables from a representative Florida station to the New York metropolitan area had been approximately $400 per carload, with minor variations for different commodities. The challenged new tariffs increase the rates for representative carload shipments to New York stations by $57. However, even with this increase it is undisputed, and the Commission has found, that the revenue produced by the new New York rates is less than the carriers' out-of-pocket expenses for transportation and delivery to certain New York stations.

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1. Greater gradation of rates, established for some of the affected commodities, does not require special consideration in this opinion since the reasoning with reference to two level rates is equally applicable.

Almost all of the evidence of higher New York costs, urged in justification of this breaking of the rate group, related to one New Jersey station and one station consisting of three New York piers. Accordingly, in considering whether the new rate structure was unduly prejudicial to New York and preferential to New Jersey, the Commission examined and determined relative costs incurred by the carriers from the point in New Jersey where the line haul from the south ends until freight becomes available to the consignee either at a Jersey City station or across the river at a New York pier. The Commission dealt separately with "terminal" costs, which are costs of movement—switching and, where necessary, floatage—from the end of the line haul to the point of delivery, and "station" costs incurred in providing suitable facilities for delivery. The Commission found that terminal costs for representative movements to New York piers are about $14.14 per carload higher than terminal costs for Jersey City delivery. It also found additional differences in costs of providing and maintaining station facilities at different points of delivery. "Ordinary" costs of providing station facilities at the New York piers were found to be $12.29 per carload higher than Jersey City station costs. And the costs of special facilities and conveniences provided at New York pier stations add an additional $36.82 to the costs of carload deliveries at this point.

Certainly these differences are substantial, since in the aggregate they amount to about 15% of the total charge for transporting vegetables from the south to New York. Moreover, as has been pointed out, the increased rates, while compensating for this differential, will still yield the carrier less than the actual cost of the services rendered.

On the other hand, the Commission expressed its proper concern to avoid, if it fairly could, the sacrifice of general advantages inherent in group rates as well as the imposition of any demonstrable particular disadvantage upon the New York area through an increase in fruit and vegetable rates applicable to New York stations only.

The history and general advantages of the rate group concept, with its requirement of long haul rate parity for all stations within a single metropolitan area, have been frequently expounded. In *The New York Harbor Case,* 1917, 47 I.C.C. 643, the Commission recognized as a fact the essential industrial and commercial unity of the metropolitan district centering on the Port of New York, saying:

> "The industrial district of northern New Jersey is so near the city of New York and so densely populated that the whole region, both in New York and in New Jersey, is commonly referred to as 'the metropolitan district'. Many thousands of people who are employed in New York have their homes in New Jersey, and every morning and evening the ferries, subway 'tubes,' and suburban trains are crowded with commuters traveling between their homes and their places of business. In this respect northern New Jersey is quite as much a part of New York as is Brooklyn or Staten Island. Moreover . . . throughout the metropolitan district there are industries engaged in the manufacture of the same articles, drawing their raw materials from the same sources and disposing of their products in common markets." 47 I.C.C. at 668-669.

It then pointed out that the establishment and maintenance of parity of long haul freight rates to and from numerous stations dispersed throughout such an extensive industrial or commercial center is a widespread practice of long standing. Thus, group rates, applicable throughout the Oakland-San Francisco area, the area around Hampton Roads which includes the cities of Norfolk, Portsmouth and Newport News, and the great industrial and commercial complex centering on Chicago are examples of this nationwide, long continued and judicially approved practice. See *Ayrshire Collieries Corp. v. United States,* 1949, 335 U.S. 573; *Lighterage Cases,* 1934, 203 I.C.C. 481; *City of Newport News, Va. v. Aberdeen & Rockfish R.R.,* 1929, 159

I.C.C. 159; *Oakland Chamber of Commerce v. Southern Pac. Co.*, 1925, 100 I.C.C. 55. The Commission also set out certain justifying general advantages that inhere in group rates:

> "Not only does this practice greatly simplify the publication of tariffs, to the convenience of both the carriers and the public, but the application of a common rate to a number of points in the same general territory effects an equality of opportunity which is usually most desirable; and this is particularly true where the points in question produce and ship the same commodity or derive their raw materials from the same sources. Producers in all parts of the port of New York are manufacturing goods for sale in common markets throughout the world." 47 I.C.C. at 712.

In addition to these general considerations, the Commission found that at least one significant economic consequence, peculiar to this case, was likely to result from the challenged differential rate increase. The matter involved is the location of a principal metropolitan center for the wholesale marketing of fruits and vegetables. The record shows that, for various reasons, the relocation of the Washington Market, a 35 acre marketing complex in lower Manhattan, is under serious consideration and is likely to occur. Moreover, in the Commission's words, "both the City of New York and the favored [by the new rates] New Jersey municipalities hope to secure the wholesale produce market for the metropolitan area for their respective localities". The Commission also found that a $57 per carload rate differential is "large enough to influence the decision as to relocation of the wholesale produce market". On the record, we cannot say that these findings and conclusions are either unreasonable or arbitrary.

Thus, the Commission had to resolve a conflict between the legitimate concern of the carriers, claiming urgent need to reduce losses, and the public interest in rate parity throughout the metropolitan area. In these circumstances,

the Commission properly considered whether the carriers' need for more revenue could be met by means other than breaking the rate group.

The record indicates that much of the high station cost at the New York piers represents the valuable service of providing extensive and specially adapted station facilities which enable a consignee to display his merchandise to prospective purchasers at the point of unloading. The Commission reasoned that a carrier may lawfully recover these and any other extraordinary New York station costs by making special accessorial charges, which are not part of the group rate, as well as unloading charges [2] where the assignee freely elects to have the carrier perform this service. The record provides no basis for challenging the Commission's conclusion that the extraordinary New York station costs, some $36.82 of the $49.11 total station cost differential, can thus be recovered without disturbing the established group rates.

The remainder of the aggregate cost differential, consisting of the $14.14 difference in terminal costs and the $12.29 difference in ordinary station costs, presents other considerations and possibilities. Although the plaintiffs aver that the exigencies of competition with motor carriers prevent raising New Jersey rates $57 to coincide with the increased New York rates, the Commission suggests that some significant part of the differential which would remain, after recoupment of extraordinary station costs, could be recovered by a modest increase of the uniform group rates, although the record does not show how much rates can be increased without undue injury to the competitive position of rail shipment in relation to trucking. The record also suggests that there may be inequity in the division of revenue from long haul charges among connecting carriers. The delivering carriers' costs, including

2. Such separate unloading charges were approved for the New York pier stations in *Increased Freight Rates*, 1958, 304 I.C.C. 289. The present opinion indicates that, upon a proper showing, these charges may be increased.

station and terminal costs, are said to have quadrupled while line haul costs have not quite doubled. To the extent that the delivering carriers' plight reflects such inequity, remedies other than breaking the group rate are available. On the present record we cannot say that such expedients would not be practical.

In this connection, it must be recognized that the basic concept of group rates unavoidably contemplates and necessitates the absorption in uniform long haul group rates of some demonstrable differences in costs of delivery at various stations within a group. Commenting upon this, the Commission has said:

> "The practice of disregarding the cost of a specific service in constructing rates for long hauls, while including it in the rates for shorter distances, is such a common one that it may well be accepted as one of the established principles of rate making in this country. . . . The reason for this general practice is, of course, that when the hauls are long the cost of the specific terminal or switching service is spread over such great distances that the cost of that service per mile is negligible; or, in other words, that the cost of that service is so small when compared with the revenue which the carrier derives from the long haul that it can be absorbed without encroaching unduly upon the carrier's earnings." *The New York Harbor Case,* 47 I.C.C. at 701.

The same point is made in *Baltimore Chamber of Commerce v. Ann Arbor R.R.,* 1929, 159 I.C.C. 691. Applying this principle the Commission's opinion in the present case indicates its judgment that even the entire $14.14 difference in terminal costs, an amount which is about 3 percent of the total established group rate, is within the legitimate reach of this concept. We cannot say that this exercise of experienced and expert judgment is unreasonable.

We conclude, therefore, that the Commission's order is adequately supported by a justified conclusion that unnecessary and undue preference and prejudice to geographic subdivisions of the New York metropolitan area is caused by the rate differential in controversy. It is unnecesary therefore, to consider the Commission's separate conclusion that the increased rates for shipment to New York stations are "unjust and unreasonable" within the meaning of section 1(5), even though they remain less than the carriers' costs, because they break the New York rate group. *Cf. Virginian Ry. v. United States*, 1926, 272 U.S. 658, 665; *but see New York v. United States*, 1947, 331 U.S. 284, 344.

This opinion incorporates this court's findings of fact and conclusions of law.

An order will be entered denying the plaintiffs relief and dismissing their complaint.

WILLIAM H. HASTIE,
Circuit Judge.

RALPH C. BODY,
District Judge.

A. LEON HIGGINBOTHAM, JR.,
District Judge.

APPENDIX B.

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INTERSTATE COMMERCE COMMISSION

No. 33105

PORT OF NEW YORK AUTHORITY ET AL. v. ABERDEEN & ROCKFISH RAILROAD COMPANY ET AL.

Decided October 24, 1962

Carload rates and charges on fresh fruits and vegetables from origins in the South and Southwest to stations in New York, N.Y., found not shown to be unjust, unreasonable, or unduly prejudicial or preferential. Complaint dismissed.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WEBB, AND HERRING

FREAS, *Commissioner:*

Exceptions to the recommended report and order of the examiner were filed by the defendants and supporting interveners, to which the complainants replied. Our conclusions differ from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By a joint complaint filed on June 24, 1959, as amended, the Port of New York Authority and the City of New York attack as unjust and unreasonable, and unduly prejudicial

and preferential, the maintenance by the defendant railroads of certain per-car charges and rates on vegetables and fruits from southern and southwestern territories to stations in New York, N.Y., which are higher than the corresponding rates and charges to points in New Jersey located within the New York rate group, specifically: (1) the per-car charges on vegetables, or vegetables and fruits in mixed cars, from the Southeast; (2) the rates per 100 pounds on peaches from the Southeast; (3) the rates
470 per 100 pounds on vegetables and melons from the Southwest; and (4) the rates per 100 pounds on citrus fruit from Florida. They ask that the alleged unlawfulness be removed by reducing the assailed rates and charges to New York stations to the level of those prevailing to the New Jersey points. The Secretary of Agriculture, the Florida Railroad and Public Utilities Commission, Florida Citrus Commission, Florida Citrus Mutual Growers and Shippers League of Florida, and the Florida Fruit and Vegetable Association intervened in support of the complainants.

Evidence in support of the assailed rates was adduced by The Pennsylvania Railroad Company on behalf of official-territory railroads, other than the Erie-Lackawanna Railroad Company and the New York Central Railroad Company.[1] The latter two carriers advocate a parity of rates to all points within the New York rate group but, unlike the complainants, they urge that rate equality be achieved by raising the level of the New Jersey rates to the level of the assailed rates. The Board of Chosen Freeholders of Hudson County, the Hoboken Chamber of Commerce, Hudson County Tax Research Council, and the Jersey City Chamber of Commerce intervened in support of the defendants.

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1. The word "defendants," as hereinafter used, refers to official-territory railroads, other than the Erie-Lackawanna and the New York Central.

By petition filed on January 3, 1962, the defendants, joined by the Erie-Lackawanna and the New York Central seek reconsideration of an order dated December 15, 1961, denying their request for oral argument. In our opinion, oral argument would serve no useful purpose. The petition, therefore, is denied.

Background of the assailed rate adjustments.—Details concering the four rate adjustments in question are set forth in the tables included in the recommended report, and herein reproduced in the appendix. For the purpose of defining and deciding the ultimate issues involved, it will be sufficient to refer mainly to the per-car charges on vegetables, and on vegetables and fruits in mixed cars, effective November 24, 1957, from southern Florida points to all New York City stations, which are $57 higher than the corresponding charges to New Jersey points located in the New York rate group.[2] The complainants rely principally on evidence relating to this particular adjustment.

471 On May 1, 1958, these charges were extended to include origins in northern Florida and in other southeastern States.[3] The general purpose of the adjustment was to enable the defendant carriers to regain traffic from unregulated motor carriers. In fixing the level of the charges, the defendants considered the revenue which had been derived from shipments of six principal vegetables at the contemporary rates per hundredweight from a representative origin in Florida (Belle Glade) to points in New

2. The assailed rates on hydrocooled peaches are 15 cents per 100 pounds higher to New York stations than to New Jersey stations in the same rate group; those on vegetables and melons from the Southwest, from 8 to 17 cents per 100 pounds higher to Baltimore & Ohio pier 22 and Pennsylvania-Erie piers 27-28-29 than to New Jersey stations and to all other New York stations in the rate group; and those on citrus fruit from Florida are generally higher to stations in the New York rate group, mileage considered, than to other destinations in official territory, but vary as between different New York stations and as between different New Jersey stations in the rate group.

3. Georgia, Alabama, Mississippi, Louisiana, Tennessee, North Carolina, and South Carolina.

Jersey in the New York rate group. It was determined that the defendants were receiving $384.17 on minimum carloads and $431.59 on average carloads. To increase their participation in this traffic, the origin lines in Florida proposed a charge of $400 per car from Belle Glade to the New York-New Jersey metropolitan area. Per-car charges from other Florida origins were proposed, and later established, to reflect the same percentage relation to the per-car charge from Belle Glade as the 100-pound rates from those origins bore to the rate from Belle Glade to New Jersey points.[4] The per-car charges alternate with the defendants' rates per hundredweight, many of which were also established to meet truck and water competition.

At the insistence of the Pennsylvania Railroad, however, the charge to New York stations in the rate group was increased by $57 per car. The additional charge was considered to be justified by reason of the greater terminal and delivery expenses involved, particularly on deliveries to Manhattan piers 27, 28, and 29.[5] The effect of the higher per-car charges to New York stations is to place them on the same level as stations in the Boston, Mass., group, over 200 miles more distant. At the request of southern and eastern rail carriers, the order in *Official-Southern Divisions*, 287 I.C.C. 497, was modified so that carriers performing the delivery service at New York stations could receive the additional $57 per car prior to division of the remaining revenue among the participating carriers. The defendants traditionally have maintained the same line-haul rate or charge on long-haul traffic to all points and stations within the New York rate group and within other destination

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4. To illustrate, the rate from Sanford, Fla., was 94.2 percent of that from Belle Glade; thus, the per-car charge from Sanford became $377. On shipments to Manhattan, an additional charge of $57 per car was assessed.

5. The Erie-Lackawanna is a joint tenant with the Pennsylvania at these piers. The Baltimore and Ohio Railroad Company contends that its costs at pier 22 justify the $57 differential also, but its participation in the perishable traffic from the Southeast is nominal.

groups, without regard to any unusual operating conditions at particular stations within a group.

Delivery of fruits and vegetables is effected at points in New Jersey on private sidings and on team tracks, the principal delivery point being the Jersey City team tracks known as the Ballground Yard. Although the assailed rates and charges generally apply to all New York City stations, practically all the evidence of record in this proceeding, and this is submitted as representative, relates to movements of perishable freight to certain Manhattan pier stations; namely, piers 27, 28, and 29, and adjoining bulkheads operated jointly by the Pennsylvania and Erie-Lackawanna.[6] All traffic delivered there must be floated for approximately 1 mile across the Hudson River from rail termini on the New Jersey side. The cars move across the river on car floats towed by tugs, each car float holding from 10 to 16 cars. Float-bridge and floating costs are not incurred, of course, on traffic destined to New Jersey points.

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The major cost differences associated with movements to New York are attributable to facilities and services provided by the railroads at the piers. These facilities and services, as both the complainants and defendants agree, greatly exceed those provided at an ordinary freight station. Actually, the piers are a market place for the produce industry. Freight is consigned to these piers because of the special services and facilities which are there provided. The piers are heated to protect the produce during the winter, and overhead blowers ventilate the area in warm weather. Auction rooms are lighted, heated, and maintained by the railroad. Floor space is assigned for each car, and the contents thereof are sorted and displayed for prospective buyers.

Another advantage in taking delivery at one of the three specified piers results from their proximity to the Washington Street Market. Within the Washington Street

6. The piers are leased from the City of New York.

market area of approximately 35 acres, there are some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables. Approximately 110,000 carlots of perishable traffic annually reach this market by rail and truck, with 75 percent going to points east of the Hudson River (of which 55 percent moves to outlets within New York City) and 15 percent going to points in New Jersey.

During 1959, 21,601 cars were unloaded at the Manhattan piers, including 13,114 cars of west coast fruits and 1,171 cars of tomatoes, which moved to the piers at the uniform New York group rate. Only 542 carloads of vegetables from Florida delivered at the piers bore the extra $57 per-car charge, and apparently about 1,000 carloads of vegetables and melons from the Southwest paid the higher rates applying to the piers. However, twice as many carloads of vegetables were delivered to New York stations other than piers 27, 28, and 29, on which differentially higher rates also applied.

473 In *Unloading Charges, Fruits and Vegetables, N.Y. and Phila.*, 272 I.C.C. 648, the Commission approved an unloading charge in addition to the line-haul rate. Prior to that decision in 1948, the unloading of perishable freight at the piers had been performed by the railroads at the line-haul rate. The Supreme Court set aside the order for lack of necessary findings, in *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954). Concerning deliveries of fruits and vegetables to the pier terminals at New York, the Court noted that it had been found that the consignees were not permitted to do their own unloading, but that the Commission had failed to explain its departure from the general rule that is the carrier's responsibility under the line-haul rate to make the goods accessible to the consignee. On further hearing, 298 I.C.C. 637, effective October 15, 1956, the unloading charge was ordered canceled, in accordance with the finding that since access to cars was not provided at the pier stations, delivery was not accomplished until the freight was unloaded.

In late 1957 the defendants published the higher $57 per-car charge to New York stations. Early in 1958 the Pennsylvania obtained the extra $57 over its normal divisions to cover its delivery expense on traffic moving to the New York piers. Then, in Ex Parte No. 212, *Increased Freight Rates, 1958,* 304 I.C.C. 289, 356, an unloading charge on perishables of $2.86 per ton was approved, based on the finding that conditions at the piers had changed and that consignees were afforded a practical option of unloading the car themselves.[7] Following approval of the separate unloading charge, the validity of which is not challenged in this proceeding, the higher $57 per-car charge to the New York stations was not canceled. According to the Pennsylvania's witness, the average revenue produced by the unloading charge is $56.06 per car.

The examiner concluded that although the assailed rates and charges are below out-of-pocket costs, they are relatively unjust and unreasonable, and are unduly prejudicial to the New York stations and to receivers there located and unduly preferential of the New Jersey stations and receivers there located. The complainants' argument that observance of tradition requires uniformity is supported by citation of *New York Harbor Case,* 47 I.C.C. 643, *Lighterage Cases,* 203 I.C.C. 481, and *State of New Jersey v. Baltimore & O. R. Co.,* 245 I.C.C. 581. We do not regard these cases as controlling the disposition of the instant proceeding; each concerned an effort to compel railroads to maintain different charges for traffic delivered in New York or its harbor compared with New Jersey deliveries. Although the voluntary action of railroads in maintaining rate uniformity on long-haul traffic destined to the New York-New Jersey metropolitan area has been approved notwithstanding the cost differences involved in effecting delivery to the various stations, it does not necessarily follow that the railroads should be compelled to continue the tradition of uniformity.

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7. In actual practice, consignees of perishable traffic have rarely availed themselves of the privilege of unloading.

The complainants urge that in view of the establishment of the higher $57 per-car charge, and the subsequent approval of an unloading charge amounting to $56.06 on average carloadings, the Pennsylvania is collecting "twice for the same accessorial service." The defendants contend that the close correspondence between the figures $56.06 and $57 is deceptive, pointing out that at the time the unloading charge at New York stations was authorized, the average loading of the considered traffic was approximately 12.32 tons, which produced an unloading revenue of $35.24 per car ($2.86 times 12.32). It is clear that the separate unloading charge approved in Ex Parte No. 212 was regarded as justified, at least in part, by the cost of pier services and facilities which the higher per-car charges, then in effect, originally were designed to cover.

However, the nub of the instant complaint is that per-car charges differentially higher to New York than to New Jersey stations are unlawful. If it is lawful to maintain such a differential in line-haul rates and charges, and if the total charge for the line-haul service is not unjust or unreasonable, there is no occasion to examine the particular items of cost upon which the line-haul rates and charges are predicated. Cf. *United States v. Beaumont, S.L. & W. Ry. Co.*, 301 I.C.C. 231. Under the indicated assumptions, it is immaterial whether the cost of performing extraordinary delivery services is recovered exclusively by higher per-car charges or in part by a separate unloading charge or by other accessorial charges. To conclude otherwise would subordinate substance to form. The complainants offered no survey or study reflecting total line-haul costs on this traffic. But the defendants have shown that from numerous representative origins to the Manhattan piers out-of-pocket costs exceed total revenue, including the charge of $57 per car in all instances except two by amounts ranging from 20 cents to $295.07 per car. There is no doubt in this proceeding that the revenue derived from the differentially higher per-car charges plus the

revenue derived from the separate unloading charge fails to meet the out-of-pocket costs of the carriers delivering perishables to the pier stations.

The issue of unreasonableness under section 1(5).— The examiner found, and we agree, that "the total services available at the Pennsylvania's Manhattan piers on perishable traffic far exceed those available at the regular stations in New Jersey." As previously indicated, the record is silent as to expenses incurred at other New York
475 stations. The examiner concluded, however, that the defendants had failed to show that the cost for placing cars at the Manhattan piers was substantially greater than the cost of switching cars at the New Jersey points, that higher cost of handling is a factor not properly included in a line-haul rate or charge, and that the assailed rates and charges are "relatively" unjust and unreasonable.

Our analysis of the cost evidence persuades us that the examiner was correct in concluding that, with few exceptions, the rates and charges on the considered perishable traffic, whether destined to New York or New Jersey stations in the New York rate group, fail to cover the total line-haul out-of-pocket rail costs. Other considerations, such as the compared rates to Boston, are not convincing that the assailed rates and charges are unreasonable per se.

We do not believe that it is unlawful for the defendants to publish tariffs which extend to shippers, under the line-haul rate or charge, various services which are generally regarded as accessorial in character. In this connection, section 6(1) of the Interstate Commerce Act provides that tariffs "shall also state separately all terminal charges * * * and all other charges which the Commission may require." In other words, there is no requirement that all such charges must be separately stated, but only such as "the Commission may require." In a number of proceedings, the Commission has refused to require the separate statement of accessorial charges. See, for example, *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21.

In our opinion, the complainants have failed to show that the assailed rates and charges are unjust and unreasonable in violation of section 1(5). The intent of that section, as here pertinent, is to prohibit the assessment of rates and charges which are too high in an absolute sense. This proceeding is concerned with rate relationships with which section 3 of the act is intended to deal. To apply a doctrine of "relative unreasonableness" to the facts of this proceeding would tend to confuse unnecessarily the purposes of sections 1(5) and 3(1). This matter was thoroughly considered by division 3 in *Southern Wyoming Coal Operators Assn. v. C. B. & Q. R. Co.*, 264 I.C.C. 593 (1946), as follows:

> It is true that in that case [*Wyoming Coal Co. v. Virginia Ry. Co.*, 98 I.C.C. 488 (1925)] division 3 said: "Under the circumstances of this case relative reasonableness, rather than intrinsic reasonableness, becomes the important thing to be considered, and other criteria, such as ton-mile earnings, fall into the background." It also said: "In any event, the rates applicable under this adjustment have been so uniformly related, and that relation has endured so long, that they now afford a standard of reasonableness from the same producing fields."

476 Although the first of the two quotations next above, standing alone, may be susceptible of such an interpretation, we do not accept as sound complainant's contention that there are two kinds of unjust and unreasonable rates within the meaning of section 1(5) of the act: (1) rates that are intrinsically unreasonable, that is, rates, that are higher than justified by the service rendered, and (2) rates that are relatively unreasonable, the latter being a hybrid between the so-called intrinsically unreasonable rates and rates that are unduly prejudicial and preferential under section 3, the principal difference being that it

is not necessary to prove injury to establish relative unreasonableness, while injury is a necessary element of undue preference and prejudice. The report in the proceeding cited meticulously sets forth many other facts upon which the findings were based. In a number of proceedings we have found that a general basis of rates applying throughout a territory constitutes a proper measure of reasonableness and in some of them unfortunately have used the expression "relative unreasonableness" or one of similar import.

The issue of undue preference and prejudice.—The complainants' evidence regarding undue prejudice to receivers of freight in New York City was presented mainly by three commercial witnesses. None was able to show that he had been adversely affected by the rate disparity in the marketing of his products. In the circumstances here presented, the vague and general declarations made as to competition and injury fail to show that complainants have been unduly prejudiced by the difference in rates and charges. *Cudahy Packing Co. v. Atchison, T. & S.F. Ry. Co.*, 234 I.C.C. 569; *A. C. Jensen Block & Supply Co. v. C., St. P. & P. R. Co.*, 273 I.C.C. 399.

One of the complainants' witnesses, a commission merchant doing business in the Washington Street market area in Manhattan, testified that rail shipments of fresh fruits and vegetables were diverted to team tracks, principally in New Jersey, when the railroads imposed an unloading charge in 1948 on shipments received at the pier stations. He did not state that the traffic returned to the piers when the unloading charge was later canceled, or that it would not return so long as the present unloading charge (not here in issue) continued to be assessed. Nor did the witness identify any competitor as having benefitted from the rate disparity. Although the witness alluded to the inconvenience and to the additional cost involved in trucking from New Jersey, he failed to indicate whether the

difference in cost was substantial or insignificant when viewed in the light of the rates and charges applicable to New Jersey stations.

Another of the complainants' commercial witnesses presented substantially similar testimony. In substance, his testimony was to the effect that it would be more convenient to receive shipments at the piers than at team tracks in New Jersey or, in some instances, at team tracks in Manhattan.

Still another commercial witness ships only from the Southwest. On such shipments, the witness can take delivery at the New York Central team tracks in Manhattan
477 at the same rates as apply to Jersey City. The position of this witness is somewhat similar to that of the complainant in *William N. Feinstein & Co. v. New York Central R. Co.*, 313 I.C.C. 783. That case concerned reparation sought on shipments of onions to pier 17 in New York on which unloading charges were collected, even though the consignee had no access to the freight without paying that charge in addition to the line-haul rate. The Commission denied reparation. In making an exception in the *Feinstein* case to the rule applied in *Unloading Charges, Fruits and Vegetables, N.Y. and Phila.*, 298 I.C.C. 637, it was pointed out that the complainants' shipments could have been delivered at the New York Central's 33rd Street station without unloading by the carrier, but that the complainant, in requesting delivery at the pier station, in effect asked the carrier to unload the freight. It would appear that this witness for the complainants also has a choice of delivery which precludes a finding that he is being unduly prejudiced.

Other shipper testimony on behalf of the complainants is to the same general effect as that discussed above. No evidence adduced by the complainants tends to show that receivers of freight at piers 27, 28, and 29 are even remotely prejudiced by the existence of lower rates on some of this traffic to other stations in New York City.

Concerning the allegation of undue prejudice and preference to the localities of the New York and New Jersey stations, respectively, as the defendants point out, undue prejudice to a locality ordinarily is suffered vicariously; that is, through injury to shippers or receivers of freight doing business in the prejudiced locality. For the reasons stated immediately above, the complainants have failed to prove any significant damage to receivers of freight doing business in New York City. A witness for the complainants conceded that removal of the produce terminal from the Washington Street area has been under consideration for "a great many years." We agree with the defendants that a general desire to relocate the Washington Market does not appear to have been prompted by the assailed difference in rates and charges. Moreover, in view of the considerable cost difference between delivering traffic in New Jersey than at the piers in New York where the rails provide many other services, it cannot be said that the difference in the rates and charges is unjustly discriminatory in any respect.

Ultimate findings.—We find that the assailed rates and charges are not shown to be unjust, unreasonable, or unduly prejudicial or preferential. The complaint will be dismissed.

COMMISSIONER WEBB, dissenting in part:

478 In my opinion, the assailed rates and charges unduly prejudice the City of New York and unduly prefer points in New Jersey located within the New York rate group. In all other respects, I agree with the findings and conclusions of the majority.

In passing on this aspect of the section 3(1) issue, it is necessary first to identify the locality alleged to be preferred and the one alleged to be prejudiced. Several witnesses in this proceeding referred to the New York-New Jersey metropolitan area as a single urban community.

Commissioner O'Shea of the City of New York pointed out that as the metropolitan region becomes more prosperous, its center, New York City, will likewise become more prosperous. Referring to that observation, the defendants suggested that the Commission would not be justified in finding any disadvantage to New York, even assuming a loss of trade to another part of the metropolitan area. They asked: "If the Metropolitan Area is the 'locality,' how could it be unduly prejudiced to the undue preference of itself?" For many purposes, of course, the New York metropolitan area may be regarded as a single economic and social community. It may be regarded as a single "locality" within the meaning of section 3(1) in determining whether it is unduly preferred or prejudiced vis-a-vis other metropolitan areas. This does not mean, however, that a "locality" for some purposes may not be composed of smaller localities, or that undue preference or prejudice with respect to the parts would not harm the whole. The residents of New York City, northern New Jersey, and the commutation area of southern Connecticut have a growing community of interest in many economic, social, and political problems but it would be contrary to law and to fact to treat them as if they were merely inhabitants of some amorphous megalopolis.

Ordinarily, as the report points out, undue prejudice to a locality is suffered vicariously; that is, through injury to shippers or receivers of freight doing business in the prejudiced locality. For the reasons stated in the report, the complainants failed to prove any significant damage to receivers of freight doing business in New York City. Moreover, the complainants failed to show that the tax revenue derived by New York City from the Washington Street market area has been endangered by the rate disparity or that employment in the area has been adversely affected. In fact, a witness for complainants conceded that removal of the produce terminal from the Washington Street area has been under consideration for "a great many

years." I agree with the report that a general desire to relocate the Washington Market does not appear to have been prompted by the assailed difference in rates and charges.

The record shows, however, that relocation of the Washington Market within the next few years at some other point in the metropolitan area is highly probable.

The Port of New York Authority, a joint agency of
479 the States of New York and New Jersey, takes no position as to where the produce market should be relocated. It contends, however, that the new location should be determined by considerations other than railroad rates and charges. It urges that, in accordance with tradition, rates and charges should be uniform to all points in the New York-New Jersey metropolitan area. The New Jersey interests, who oppose rate uniformity, obviously hope that the produce market will be relocated on their side of the Hudson River. They have pointed to New York's rate handicap as one reason for establishing a major produce terminal in northern New Jersey. A law recently enacted by the New Jersey Legislature (Chapter 18, P.L. 1960) authorizes the establishment of a New Jersey Public Market Commission for the purpose of financing and operating a public produce market.

The defendants contend, however, that the Commission should not consider the possibility of relocating the Washington Market in New York City, or the City's desire for such relocation, "as a relevant fact in determining whether undue preference and prejudice between localities *now* exists" (emphasis added). I do not agree. The $57 higher per-car charge is large enough to influence to some extent the decision eventually reached in regard to relocation of the produce market. If the rate disparity should influence a decision to relocate the market in New Jersey rather than in New York, any remedy which might then be available to the City of New York under section 3(1) could not undo the damage. I agree with the complainants that the public and

private interests involved are entitled to have the decision as to the relocation of the Washington Market made in accordance with the tradition of rate equality which has existed for at least 75 years.

I am not unmindful of the defendants' argument that this Commission has too great a responsibility for their revenue needs to be concerned with the desires of the complainants to have the relocation of the produce terminal determined without reference to any difference in line-haul rates and charges. A more important principle is embodied in the contrary view. That principle is more important today than ever before. It is common knowledge that planning on a scale never before attempted is required to cope with the mounting problems of urbanization. A new produce market is only one of many facilities that may require community planning, bi-State cooperation, and a huge investment secured in part by public credit. The location of such facilities is not decided by happenstance but rather in accordance with some plan for regional or community development. Intelligent planning could be frustrated if railroads serving the area were free to impose or not to impose a rate handicap on part of the area involved.

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This conclusion is reinforced by the tradition of rate equality in the New York area which the defendants voluntarily initiated and continued for some 75 years. It is clear that the defendants have derived significant advantages from not being compelled to publish rates which precisely reflect the different costs involved in serving numerous stations in the New York rate group.[8] As pointed out by the Commission in *New York Harbor Case*, 47 I.C.C. 643, 712:

> The practice of embracing many points within the same group or zone has been so generally adopted by the carriers and so frequently recognized as proper by this Commission that its general propriety can hardly

8. The tariff names 24 points in New York and 100 in New Jersey as taking the New York rate basis.

> be challenged. Not only does this practice greatly simplify the publication of tariffs, to the convenience of both the carriers and the public, but the application of a common rate to a number of points in the same general territory effects an equality of opportunity which is usually most desirable; and this is particularly true where the points in question produce and ship the same commodity or derive their raw materials from the same sources.

In that proceeding the State of New Jersey urged that the northern part of the State be removed from the New York rate group in view of the cost of service advantages involved. The Commission, however, held: "The effect of such a course would be to accord a preferential basis of rates to one part of an industrial community, to the disadvantage of another part." 47 I.C.C. at page 737. See also *Lighterage Cases*, 203 I.C.C. 481.

It is anomalous to permit railroads to enjoy the fruits of a policy of rate equalization, notwithstanding the cost-of-service and distance advantages of particular points in a locality, but to avoid the burdens of such a policy merely upon showing that some stations in a locality may be served less expensively than others. This does not mean that minor differences within a particular rate group are necessarily unlawful; or that differences in rates and charges on short-haul traffic may not be lawful; or that there may not be special circumstances which would justify rate disparity within a well-defined destination group. In general, however, it is better for the railroads and for the localities they serve if the effect of freight rates on intracommunity competition and urban planning is neutralized.

Rate equalization does not mean here, for example, that the defendants would be required to handle the involved traffic at an out-of-pocket loss in excess of that now being incurred. They could, for example, average out the cost differences involved by increasing the line-haul rates and

charges to New Jersey points and reducing the rates
481 and charges to New York stations. Or, they could increase the rates and charges to New Jersey points to the New York level, provided in each instance, of course, that New York rate group would be properly related to other destination rate groups. A more feasible alternative for the defendants, perhaps, would be to publish accessorial charges for the special services provided at Manhattan piers 27–28–29 but not at New Jersey stations and apparently not at other New York stations.

APPENDIX

TABLE No. I.—*Per-car charges on vegetables from representative Florida origins to various destinations*

[Charge per car—(docket 28300 rail milages)]

To—	*Commodities and origins*				
	Snap beans, Pompano	*Cabbage, Belle Glade*	*Celery, Sanford*	*Tomatoes, Fort Pierce*	*Green Corn, Pompano*
(A) Representative N.Y. stations of:					
Piers 22, 27, 28, 29; 26th & 37th St. Yds.	$464 (1,308)	$457 (1,271)	$434 (1,093)	$452 (1,209)	$464 (1,308)
Bronx Terminal					
Harlem River					
Queens					
Brooklyn, N.Y.					
(B) Representative N.J. stations of:					
Jersey City	$407 (1,308)	$400 (1,271)	$377 (1,093)	$395 (1,209)	$407 (1,308)
Newark					
Paterson					
Rutherford					
Passaic					
(C) Representative Eastern Points of:					
Boston, Mass.	$464 (1,535)	$457 (1,498)	$434 (1,320)	$452 (1,436)	$464 (1,535)
Portland, Maine	(1,636)	(1,599)	(1,421)	(1,537)	(1,636)
Hartford, Conn.	(1,433)	(1,396)	(1,218)	(1,334)	(1,433)
Providence, R.I.	(1,508)	(1,471)	(1,293)	(1,409)	(1,508)
(D) Other representative destinations:					
Chicago, Ill.	$416 (1,377)	$409 (1,332)	$386 (1,169)	$404 (1,277)	$416 (1,377)
Baltimore, Md.	$388 (1,127)	$384 (1,072)	$361 (912)	$376 (1,008)	$388 (1,127)
St. Louis, Mo.	$400 (1,223)	$395 (1,166)	$372 (1,011)	$386 (1,127)	$400 (1,223)

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TABLE No. II.—*Rates on citrus fruits in cents per 100 pounds from Florida to various destinations in official territory*

To—	*Commodities and origins*			
	Oranges, Orlando, Fla.		*Grapefruit, Winter Haven, Fla.*	
	Docket 28300 mileage	*Rate in cents per cwt.*	*Docket 28300 mileage*	*Rate in cents per cwt.*
(A) Representative N.Y. stations:				
Piers 22, 27, 28, 29	1,114	120	1,142	121
37th St. Yard	1,114	155	1,142	156
Bronx Terminal	1,114	130	1,142	131
Harlem River	1,114	130	1,142	131
Jamaica, Maspeth	1,114	122	1,142	136
Long Island City	1,114	122	1,142	136
26th St. Yard	1,114	120	1,142	121
(B) Representative N.J. stations:				
Jersey City & Newark	1,114	110	1,142	111
Paterson, Rutherford, Passaic	1,114	100	1,142	113
So. Plainfield	1,114	115	1,142	156
(C) Representative eastern points:				
Boston, Mass.	1,341	130	1,369	131
Portland, Maine	1,442	164	1,470	166
Hartford, Conn.	1,239	130	1,267	131
Providence, R.I.	1,314	130	1,342	131
Chicago, Ill.	1,189	95	1,003	106
Baltimore, Md.	933	79	961	89
St. Louis, Mo.	1,031	95	1,040	106

NOTE.—As can be observed the rates on oranges ex Orlando to New York stations varies from 100 to 155 cents per 100 pounds, depending upon the particular destination but irrespective of rail distance. Further, the rate to Jersey City stations on the Pennsylvania Railroad is 110 cents but to the Pennsylvania Manhattan piers 27, 28, and 29 it is 120 cents, while a rate of 155 cents applies to the Pennsylvania team track at 37th Street, Manhattan.

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TABLE No. III—*Rates in cents per 100 pounds on hydrocooled peaches from representative origins to official territory stations*

To—	Origins: Fort Valley, Ga. — Docket 28300 miles	Fort Valley, Ga. — Rate in cents per cwt.	Fort Valley, Ga. — Charges[1]	Spartansburg, S.C. — Docket 28300 miles	Spartansburg, S.C. — Rate in cents per cwt.	Spartansburg, S.C. — Charges[1]
(A) Representative N.Y. stations: Piers 22, 27, 28, 29 ... 26th & 37th Sts. Yards Bronx Terminal ..... Harlem River ..... Queens ..... Brooklyn	937	133	$402.33	681	122	$369.05
(B) Representative N.J. stations: Jersey City ..... Newark ..... Paterson ..... Plainfield ..... Rutherford ..... Passaic	937	118	356.95	681	107	323.68
(C) Representative eastern points:						
Boston, Mass.	1,164	133	402.33	908	122	369.05
Portland, Maine	1,265	136	411.40	1,009	126	381.15
Hartford, Conn.	1,062	133	402.33	806	122	369.05
Providence, R.I.	1,137	133	402.33	881	122	369.05
Baltimore, Md.	756	111	335.78	500	98	296.45
Pittsburgh, Pa.	874	116	350.90	690	107	323.68
Buffalo, N.Y.	995	120	363.00	852	113	341.83

1. Charges based on tariff published minimum weight—30,250 pounds.

NOTE.—The effect of the rates structure is to require consignees or receivers at New York stations to pay the same rates and charges on shipments from the named representative origins as consignees or receivers of the same commodity at Boston, even though the latter are 227 rail miles more distant from the points of origin; simultaneously, consignees or receivers at New Jersey stations have available rail rates which are 15 cents per hundred pounds lower than those applicable to Manhattan.

TABLE No. IV.—*Rates in cents per 100 pounds on fresh vegetables and melons under varying minimum weights from named origins to representative points in official territory*

To—	Commodities and origins: Vegetables McAllen, Tex. Docket 28300	Vegetables McAllen, Tex. Minimum 25,000 pounds	Vegetables McAllen, Tex. Minimum 30,000 pounds	Vegetables McAllen, Tex. Minimum 36,000 pounds	Vegetables McAllen, Tex. Minimum 40,000 pounds	Melons Laredo, Tex. Docket 28300	Melons Laredo, Tex. Minimum 20,000 pounds	Melons Laredo, Tex. Minimum 25,000 pounds	Melons Laredo, Tex. Minimum 30,000 pounds
(A) Representative N.Y. stations:									
Piers 22, 27, 28, 29; 26th, 33d, and 37th Sts.	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*
Yards	2,025	229	207	178	163	2,012	258	223	202
Bronx Terminal, Harlem River, Queens, Brooklyn	2,035	212	192	165	152	2,012	244	211	191
(B) Representative N.J. stations:									
Jersey City, Newark, Paterson, Rutherford, Passaic	2,025	212	192	165	152	2,012	244	211	181
(C) Representative eastern points:									
Boston, Mass.	2,245	229	207	178	163	2,190	258	223	202
Portland, Maine	2,317	236	213	183	168	2,262	265	229	207
Hartford, Conn.	2,144	229	207	178	163	2,122	258	223	202
Providence, R.I.	2,219	229	207	178	163	2,195	258	223	202
Chicago, Ill.	1,383	116	151	130	120	1,328	186	161	146
Baltimore, Md.	1,838	199	181	155	143	1,831	229	198	179
St. Louis, Mo.	1,122	147	133	115	106	1,067	162	141	128

APPENDIX C

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No. 33105 [1]

PORT OF NEW YORK AUTHORITY ET AL. V. ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.

Decided January 22, 1964

1. In No. 33105 on reconsideration, carload rates and charges on fresh fruits and vegetables from origins in the South and Southwest to stations in New York, N. Y., found to be unjust and unreasonable and to be unduly prejudicial to the City of New York and unduly preferential to New Jersey stations within the New York rate group.
2. Findings in prior report, 318 I.C.C. 469, reversed.
3. In No. 33899, carload rates on fresh fruits from origins in Colorado and Kansas to New York, N. Y., piers found to be unjust and unreasonable and to be unduly prejudicial to the City of New York and unduly preferential to New Jersey stations within the New York rate group.
4. Unlawfulness required to be removed.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

WEBB, *Vice Chairman:*

In the prior report, 318 I.C.C. 469, division 2 found that the carload rates and charges on fresh fruits and vegetables

1. This report embraces also No. 33899, Fresh Fruits, Colorado and Kansas to New York, N.Y., Piers.

from origins in the South and Southwest to stations in New York, N. Y., were not shown to be unjust, unreasonable, or unduly prejudicial or preferential. Upon petitions of the complainants, supporting interveners, and the Secretary of Agriculture of the United States, and replies thereto by the defendants and supporting interveners, we reopened the proceeding for reconsideration.

739 In No. 33899 on protest of the complainants in the title proceeding, an investigation, without suspension, was instituted by order of the Commission on October 5, 1961, into proposed rail carload rates on fresh fruits from Colorado and Kansas origins to New York, N. Y., piers. The parties therein have stipulated to be bound by the decision in the title proceeding.

The complainants, the Port of New York Authority, and the City of New York, allege that certain per-car charges and rates on fresh fruits and vegetables from origins in the South and Southwest to stations in New York are unjust and unreasonable, and unduly prejudicial to complainants and to receivers of freight located in New York City and unduly preferential to New Jersey points and receivers of freight located there. Facts recited in the prior report will be restated only to the extent necessary for a clear understanding of the issues.

The complaint was prompted by the defendants'[2] maintenance of per-car charges and rates on fresh fruits and vegetables from origins in the South and Southwest to stations in New York City which are higher than the corresponding rates and charges to stations in New Jersey located in the New York rate group.[3] Complainants urge that the unlawfulness be removed by reducing the rates

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2. The term "defendants," as hereinafter used, refers to official territory railroads, other than the Erie-Lackawanna Railroad Company and the New York Central Railroad Company.

3. The New York rate group embraces 25 stations in New York and 100 stations in New Jersey.

and charges to New York stations to the level of those applying to the New Jersey points. Two of the defendant carriers, the Erie-Lackawanna and the New York Central, advocate a parity of rates to all points within the rate group but, unlike the complainants, they urge that rate equality be achieved by raising the level of the New Jersey rates to the level of the assailed rates.

Four separate rate adjustments, described in detail in the prior report, are under attack herein. Most of the evidence of record relates to the per-car charges on vegetables and on vegetables and fruits in mixed cars, effective November 24, 1957, from south Florida points to the New York City stations. As shown in the prior report, these per-car charges are $57 higher to all New York City stations than the corresponding charges to New Jersey points located in the New York rate group. These charges, which were established to enable the defendant carriers to regain traffic from unregulated motor carriers, were extended on May 1, 1958, to include origins in northern Florida and other southeastern States.[4] These charges alternate with the defendants' 100-pound rates, many of which were
740 established to meet truck and water competition.

The additional charge to the New York stations was felt by the defendants to be justified by reason of the greater terminal and delivery expenses incurred there, particularly on deliveries to Manhattan piers 27, 28, and 29.[5] As a result of a modification of the outstanding order in *Official-Southern Divisions,* 287 I.C.C. 497, the carriers performing the delivery service at the New York stations receive the additional $57 per car prior to division of the remaining revenue among the participating carriers.

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4. Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

5. The Erie-Lackawanna and the Pennsylvania, joint tenants, lease these piers from the City of New York. The Baltimore & Ohio contends that its costs at pier 22 also justify the $57 differential, but its participation in the perishable traffic from the Southeast has been negligible.

In addition to the above-described charges, the complainants also attack the rates on hydrocooled peaches from the Southeast to the New York stations, which are 15 cents per 100 pounds higher than those to the New Jersey stations; the rates on vegetables and melons from the Southwest, which range up to 17 cents per 100 pounds higher to the New York piers than to the New Jersey points and to other New York stations in the rate group; and the rates on citrus fruits from Florida, which vary as between different New York stations and as between different New Jersey stations in the rate group.

Delivery of fruits and vegetables is made at points in New Jersey on private sidings and on team tracks, the principal delivery point being the Jersey City team tracks known as the Ballground Yard. Traffic delivered to the Manhattan piers must be floated approximately 1 mile across the Hudson River from the New Jersey side. The cars move across the river on car floats towed by tugs, with each car float holding from 10 to 16 cars. However, traffic originating in the Southwest and destined to New York stations may also move over the lines of the New York Central extending into Manhattan.

Most of the evidence of record relates to the delivery of perishable freight at Manhattan piers 27, 28, and 29. These piers constitute one of the 25 New York stations. The facilities and services provided by the rail carriers at these piers, which are actually a market place for the produce industry, greatly exceed those provided at an ordinary freight station. The piers are heated to protect the produce during the winter and overhead blowers
741 ventilate the area in warm weather. Auction rooms are lighted, heated, and maintained by the railroads. Floor space is assigned for each car and the contents thereof are sorted and displayed for prospective buyers. In addition to the considered traffic, imported fruit is consigned to these piers. The piers are located near the Washington Street Market. Within the market area of about 35 acres,

there are some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables. A survey conducted in 1956 showed that over 110,000 carlots of perishable traffic were delivered by rail and truck to the Washington Street Market. Approximately 75 percent of that traffic ultimately moved to points east of the Hudson River (55 percent to outlets in New York City) and 15 percent to points in New Jersey.

During 1959, 21,601 cars were unloaded at the Manhattan piers. Included were 13,114 cars of west coast fruit and 1,171 cars of tomatoes which moved to the piers at the New York group rate. There were 542 cars of tomatoes and vegetables from the South delivered at the piers which bore the extra $57 per-car charge, and apparently about 1,000 carloads of vegetables and melons from the Southwest paid the higher rates applying to the piers. Over 1,100 cars of vegetables subject to the $57 per-car charge were delivered at stations east of the Hudson River other than the piers. Approximately 5,700 cars of citrus from the South were handled at piers 27, 28, and 29 at rates lower than those applicable to a number of other stations in the New York rate group. In other words, the vegetable traffic from the South, amounting to less than 3 percent of the total perishable traffic handled at the piers, was assessed the higher per-car charges while all other traffic handled at the piers, except Florida citrus, moved at the same line-haul rates applicable to deliveries throughout the New York-New Jersey rate group.

In 1948, in connection with the services provided at the piers, the Commission approved an unloading charge in addition to the line-haul rate. *Unloading Charges, Fruits and Vegetables, N.Y. & Phila.*, 272 I.C.C. 648. Subsequently, the Supreme Court in *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954), set aside the Commission's order for lack of necessary findings. Noting that the consignees were not permitted to do their own unloading, the Court pointed out that the Commission had failed

to explain its departure from the general rule that it is the carrier's responsibility under the line-haul rate to make the goods accessible to the consignee. In a report on further hearing, 298 I.C.C. 637, decided June 28, 1956,
742 the unloading charge was condemned on the ground that since access to the cars was not provided at the pier stations, delivery was not accomplished until the freight was unloaded.

In late 1957, the defendants published the $57 higher per-car charge to New York stations. Early in 1958 the Pennsylvania Railroad obtained the extra $57 over its normal divisions ostensibly to cover its delivery expenses on traffic moving to the New York piers. Then, in Ex Parte No. 212, *Increased Freight Rates, 1958,* 304 I.C.C. 298, 356, the Commission approved an unloading charge on perishables of $2.86 per ton, finding that conditions at the piers had changed and that consignees were afforded a practical option of unloading the cars themselves.[6] Following approval of the separate unloading charge, the validity of which is not challenged in this proceeding, the $57 higher per-car charge to the New York piers was not canceled.

The Cost Evidence

In an effort to justify the assailed rates on a cost basis, the Pennsylvania Railroad submitted a cost study on 24 representative movements from origins in the South and Southwest to Manhattan piers 27, 28, and 29. The origin terminal and line-haul costs were based on statement 5-59, Railroad Cost Scales by Territories for the year 1958, for the southern region, western district, and eastern district where appropriate. Destination terminal costs used were those experienced by the Pennsylvania. Certain of the later costs were based on the study week of February 14 to 20, 1960. Other destination terminal costs not incurred on a daily basis were determined either for a 3-year period, 1957-59, or for 1959, and apportioned to the study week.

6. In actual practice, consignees of perishable traffic have rarely availed themselves of the privilege of unloading.

RATIO OF OUT-OF-POCKET COSTS TO REVENUES

The defendants have shown that the out-of-pocket costs exceed total revenue, including the charge of $57 per car, in all instances except five and by amounts ranging from 20 cents to $295.07 per car. As pointed out in the prior report: "There is no doubt in this proceeding that the revenue derived from the differentially higher per-car charges plus the revenue derived from the separate
743 unloading charge fails to meet the out-of-pocket costs of the carriers delivering perishables to the pier stations." In our opinion, the cost evidence of record fully supports that conclusion.

TERMINAL COST COMPARISONS

As used in this report, the words "terminal costs" refer to the costs incurred between completion of the line-haul rail movement and the placement of cars in a position where they are accessible to consignees. Set forth below is a comparison of terminal costs experienced at the Manhattan piers with those experienced at a representative New Jersey point.

	Cost per car	
	Henderson St., Jersey City	*New York piers 27-28-29*
Switching	$35.55	$23.94
Float Bridge		6.82
Floating		18.93
Total	35.55	49.69

As pointed out in the recommended report, it is impossible to determine on this record the precise difference between the compared terminal costs. Nevertheless, in view of the difficulties inherent in comparing the costs involved in two radically different terminal operations, we feel justified in concluding that the per-car cost of effecting delivery to the New York piers has been shown to be ap-

proximately $14.14 higher than the corresponding terminal costs at representative New Jersey points.

STATION COST COMPARISONS

As used in this report, the term "station costs" includes all costs associated with delivery excluding, of course, the terminal costs noted above and the cost of unloading and sorting at the New York piers, for which service an unloading charge is imposed. Set forth below is a reasonably accurate comparison of station costs at the Manhattan piers and at the representative point of Henderson Street, Jersey City.

	Cost per car	
	Henderson St., Jersey City	*New York piers 27-28-29*
Station (normal delivery) ..	$13.54	$25.83
Station (extraordinary pier delivery costs)		36.82[1]
Total	13.54	62.65

1. Estimated in the manner indicated in the appendix hereto.

It was not necessary for the examiner or the division to consider whether the station cost of $62.65 at piers 27, 28, and 29, as shown in defendants' exhibits 64 and 70, reflected a proper allocation of cost as between extraordinary pier delivery costs and those which would have been incurred in ordinary station delivery. In the opinion of the examiner, the station costs in question arose from services not properly includible in the line-haul rate but "for which some additional accessorial charge might be justified upon another record." Division 2 concluded that the differentially higher rates and charges could not be found to be unjust and unreasonable if the total charge for the service was not unjust and unreasonable, and thus had no occasion

to decide whether the alleged station costs of $62.65 involved costs other than those attributable to extraordinary pier services and facilities.

Contrary to the view expressed in the recommended report, it is not unlawful for the defendants to publish tariffs which extend to shippers, under the line-haul rate or charge, pier services and facilities which are accessorial in character. In this connection, section 6(1) of the Interstate Commerce Act provides that tariffs "shall also state separately all terminal charges * * * and all other charges which the Commission may require." In other words, there is no requirement that all such charges must be separately stated, but only such as "the Commission may require." In a number of proceedings, the Commission has refused to require the separate statement of accessorial charges. See, for example, *City of Philadelphia v. Baltimore & O.R. Co.*, 231 I.C.C. 21.

Contrary to the prior report, we do not believe that the defendants' action in splitting the New York rate group can be justified merely on the ground that the differentially higher rates and charges fail to recover the out-of-pocket costs involved in performing the service in question. In our opinion, differentially higher rates and charges to New York stations could be justified to the extent that the higher charges reflected the cost of providing services and facilities which differ in kind from those provided at other stations in the rate group. On this record we do not
745 regard the $14.14 per-car difference in terminal costs as controlling. Cost differences of that degree may be found to exist as between stations in any large rate group. Furthermore, the cost of providing extraordinary services and facilities at one New York station (piers 27-28-29) affords no justification for the imposition of higher rates and charges at other New York stations where no such pier services are performed.

COST CONCLUSIONS

In view of the conclusions expressed above, it is necessary to determine whether the station costs of $62.65 are attributable solely to extraordinary pier services and facilities or whether a part of such costs would have been incurred in connection with ordinary station delivery. Analysis of the defendants' exhibits 64 and 70 indicates that approximately $25.83 would have been incurred as usual station delivery, leaving approximately $36.82 per car as properly chargeable to pier delivery. These estimates are more fully explained in the appendix but the basis of the estimated amounts is as follows:

(1) The railroad would incur station, shipment billing costs and inspection costs regardless of method of delivery.

(2) The expense of car floats and their use at the piers is in substitution of team or station tracks that the railroad is required to furnish consignees.

(3) The pier rental includes the piers along which car floats are attached and the covered shed portion in which the fruit and vegetables are placed. The pier portion is considered as the equivalent of driveways alongside team tracks and only the shed portion as being peculiar to New York delivery. In the absence of specific data in this record, this expense has been equally assigned to each service. The rental expense attributable to the auction room was assigned by the railroad to that service, and the rental expense due to station agency was included in the estimate of $25.83.

(4) Estimates of other services and supplies have been made in accordance with the above three items.

Although differentially higher per-car charges at New York piers 27, 28, and 29 in the approximate amount of $36.82 appear to be warranted by the cost evidence of record,

it is clear that the $57 per-car charge applicable to *all* New York stations cannot be defended on the basis of the cost of providing extraordinary delivery services at the three piers.

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GENERAL DISCUSSION AND CONCLUSIONS

In the prior report, division 2 disagreed with the examiner's finding that the assailed rates and charges are "relatively high, unjust and unreasonable" in violation of section 1(5) of the act. We recognize that a doctrine of "relative unreasonableness," unless carefully defined and applied, would tend to confuse unnecessarily the purposes of sections 1(5) and 3(1) of the act. *Cf. Southern Wyoming Coal Operators Assn. v. C., B. & Q. R. Co.*, 264 I.C.C. 593. However, we are unable to accept the conclusion in the prior report that the only intent of section 1(5), as here pertinent, is to prohibit the assessment of rates and charges which are too high in an absolute sense. Since the assailed higher rates and charges generally fail to cover out-of-pocket costs, they are obviously not too high in any absolute sense, but it does not necessarily follow that they are just and reasonable within the meaning of section 1(5) of the act.

In considering the justness and reasonableness of rates, the Commission frequently resorts to rate comparisons to determine reasonableness from a "relative" point of view. In *Baltimore & O. R. Co. v. United States*, 345 U.S. 146 (1953), the Supreme Court held that as long as rates as a whole afford just compensation for all carrier services to the public, the Commission was not barred from fixing noncompensatory rates for carrying some commodities and upheld the Commission's prescription of "reasonable" rates on vegetables even though the prescribed rates were below the carriers' out-of-pocket costs. We conclude, therefore, that the Commission is authorized by section 1(5) to determine what is a reasonable relationship of rates within a general rate structure irrespective of the depressed level of the rates under attack.

THE SECTION 1(5) ISSUE

Historically, the railroad rate structure has been characterized by the maintenance of terminal rate groups. Many of these rate groups were established over a century ago, but the integrity of the groups is respected today to substantially the same extent as in the past. Whenever the integrity of the New York rate group has been challenged, the Commission has upheld the practice of rate equalization. In proceedings in which the Commission has prescribed or approved rates to destinations in official territory, the Commission has rarely, if ever, prescribed or approved rates to New Jersey points lower than
747 those to New York stations in the same group.

Exceptions to the principle of rate-group integrity are more apparent than real. Defendants refer, for example, to varying rates on short-haul traffic to stations in the New York rate group, the exclusion of switching absorption, the occasional restriction of rate application where lighterage is involved, and other isolated departures from the principle of rate uniformity. However, these examples, to the extent pertinent, must be regarded as exceptions proving the rule.

In *Lighterage Cases,* 203 I.C.C. 481, 512 (1934), the Commission referred to the "century-old practice of equalizing the rates at all points in the port of New York district." Thus, the tradition of rate uniformity began shortly after the first railroad lines into New York were constructed. The practice of rate equalization, therefore, antedates Federal transport regulation by half a century. The practice was not seriously challenged until 1917, when New Jersey interests sought rates to and from northern New Jersey lower than to New York by the amount of the cost of lighterage to New York. In *The New York Harbor Case,* 47 I.C.C. 643, the Commission, after an exhaustive investigation, dismissed the complaint, stating at page 739 of its report:

If we could overlook the fact that historically, geographically, and commercially New York and the industrial district in the northern part of the state of New Jersey constitute a single community; if we could disregard the fact that the freight rates in this country are not and never have been constructed solely with regard to the specific cost of operation; if it were not clear that the establishment of rate groups is in some instances beneficial alike to the carriers and to the public; if we could forget for the moment that both sides of the port of New York always have been and doubtless always will be accorded the same rates by the boat lines; were it not for the fact that to grant the relief asked would inevitably disrupt the whole structure of rates to and from the Atlantic seaboard, and this without any substantial showing by the complainants that the present adjustment operates to their actual injury; if we could disregard the fact, abundantly established by the evidence of record, that the communities of northern New Jersey have prospered under the present rate adjustment; and if we were not persuaded that cooperation and initiative must eventually bring about the improvements and benefits which the complainants hope to attain through a change in the rate adjustment; then we might conclude that the present rates result in undue prejudice to the people and the communities on whose behalf this complaint was filed. On the evidence now before us that conclusion can not be reached.

748 The *Lighterage Cases, supra,* as noted by the Commission, were "in large part a retrial" of *The New York Harbor Case.* At pages 509-511 of its report in the *Lighterage Cases,* The Commission concluded:

If we could assume that the marine-terminal service beyond the railheads was in each instance a service over and above that necessary to make track delivery, as contended by complainants, and that for such marine

services we should require the carriers to collect compensation in addition to the line-haul rates which would reflect the cost of such marine services, a chaotic rate situation would result. As heretofore pointed out, the evidence of record shows that the costs of the different marine services, of the various carriers, of various commodities, to and from various sections of the port, and in various kinds of equipment differ very greatly, and if the additional compensation were to be based on these greatly varying costs the result could only be confusion and an impractical and unworkable rate structure."

* * *

In every group of adjustment some points in the group are more favorably located and required less transportation service than others. Something more than a disparity in the amount or cost of the services performed for different shippers within the group is necessary to a finding that the group rate is unlawful. If this were not so, every group rate would have to be condemned, with the result that the entire rate structure of the country would have to be remade."

After reviewing the century-old practice of rate equalization, the Commission observed at page 511 of its report in the *Lighterage Cases:*

As a result, there has been in effect for almost a century an adaptable, flexible, and practical means for collecting, delivering, and interchanging freight without delay or congestion; each carrier serving the port has been on a competitive equality with all others and no one has been permitted to become a dominant factor; and with few exceptions all shippers and receivers of freight and all communities in the port district have been and are now on a rate equality.

The Commission's ultimate conclusion in the *Lighterage Cases* was expressed as follows on page 513 of the report:

> These facts, together with the effect which the relief sought by complainants would have on the commerce of the country and the general public interest, cannot properly be overlooked and disregarded. Both the commerce of the country and the general public interest *require* the continued maintenance of such terminal groups as the New York, Hampton Roads, San Francisco, Chicago, and St. Louis groups. [Emphasis added.]

In the prior report of division 2 in the title proceeding, the *Lighterage Cases* were distinguished on the following ground:

> Although the voluntary action of railroads in
> 749 maintaining rate uniformity on long-haul traffic destined to the New York-New Jersey metropolitan area has been approved notwithstanding the cost differences involved in effecting delivery to the various stations, it does not necessarily follow that the railroads should be compelled to continue the tradition of uniformity.

The question as to whether or not continuance of the tradition of uniformity should be required must be determined on its merits and not on the basis of whether the splitting of the New York rate group is proposed by carriers or by port and other interests. Contrary to the majority and minority opinions in the prior report, the Commission may find rates and charges proposed by carriers unjust and unreasonable on the ground that they disrupt the integrity of long-established rate groups. *Unloading Charges, Fruit and Vegetables, N. Y. and Phila.*, 298 I.C.C.

637, 652, 658-659.[7] Of course, the practice of rate equalization should not be required merely for the sake of tradition, but only if the benefits resulting from the practice are substantial and in the public interest.

The assailed rates and charges prove that the Commission's fears in the *Lighterage Cases, supra,* respecting a chaotic and confused rate situation were fully justified. As indicated, the defendants maintain higher per-car charges on fruits and vegetables to all New York City stations than to New Jersey stations, based on the pier services performed at one New York City station but not at other New York stations; maintain higher rates on hydrocooled peaches to New York stations than to New Jersey stations in the same rate group, although very few shipments of peaches move over piers 27, 28, and 29; maintain higher rates on vegetables and melons from the Southwest to piers 27, 28, and 29 than to all other New York and New Jersey stations in the rate group; and maintain rates on citrus from Florida which vary as between different New York stations in the rate group and also as between different New Jersey stations in the same group.

The fears expressed by the Commission in the *Lighterage Cases, supra,* respecting the creation of an impractical and unworkable rate structure are also confirmed by this proceeding. As previously noted, there are 125 stations in the New York rate group. At no two of these stations is the cost of effecting delivery precisely the same. If
750 the defendants were permitted to publish 125 different rates on each of the four major movements and ostensibly on the basis of differences in the cost of service involved, neither the Commission nor any combination of shippers could, as a practical matter, prove

7. Subsequently, in Ex Parte 212, *Increased Freight Rates, 1958,* 304 I.C.C. 289, the Commission approved separate unloading charges but only after finding that consignees of perishables at the piers would be given reasonable access to their shipments and thus, an option to unload the cars themselves.

that more than a few such rates were not justified costwise.

The splitting of long-established rate groups is so obviously inconsistent with the goal of tariff simplification as to require no elaboration.

The unjustness and unreasonableness resulting from splitting the New York rate group is best shown by the fact that, with respect to the per-car charges on vegetables from the Southeast, charges to New York City stations would be the same as to points in the Boston rate group 220 miles more distant. This anomaly cannot be explained by the 1-mile water journey to piers 27, 28, and 29. Traffic destined to Boston is interchanged by the Pennsylvania with the New Haven at Greenville piers where a water movement precedes the 220-mile overland transportation to Boston.

The defendants maintain, however, that their revenue needs are so great that they can no longer afford to extend to shippers and receivers of freight and to localities the benefits heretofore derived from the practice of rate equalization. One answer to this contention is that the defendants benefit from the practice in certain circumstances while shippers and receivers of freight and localities suffer a corresponding disadvantage. The practice can hardly be maintained solely for the benefit of carriers.

More importantly, there is no apparent reason why the practice of rate equalization should be inconsistent with the revenue needs of the defendants. To the extent that the unloading charge at piers 27, 28, and 29 fails to cover the cost of performing that service, the charge can be increased. Rates and charges to New Jersey stations can be increased to the New York City station level or rates and charges to the former stations can be raised and those to the latter stations reduced. And finally, defendants may recover in the form of a separately stated accessorial charge the cost of performing extraordinary services at the pier stations. Although the present record fails to show that the cost in question approaches $57 per car, it

does indicate that such cost is substantial and that it differs in kind from the delivery service provided at New Jersey stations in the New York rate group.

751 THE SECTION 3(1) ISSUE

The prior report found, correctly in our opinion, that the complainants failed to establish undue preference and prejudice through the testimony of three commercial witnesses. The prior report then noted that "undue prejudice to a locality ordinarily is suffered vicariously; that is, through injury to shippers or receivers of freight doing business in the prejudiced locality." Although the observation is true as a matter of fact, a locality may show that it has been prejudiced within the meaning of section 3(1) by evidence other than that developed through shippers or receivers of freight. In *New York v. United States*, 331 U.S. 284 (1947), the Supreme Court held that class rates higher in the South than in official territory unlawfully discriminated against the former region although there was no showing of prejudice to individual shippers or receivers.

It is also true, as pointed out in the prior report, that removal of the produce terminal from the Washington Street area has been under consideration for a number of years and that such consideration does not appear to have been prompted by the assailed rate disparities. Nevertheless, the record shows that both the City of New York and the favored New Jersey municipalities hope to secure the wholesale produce market for the metropolitan area for their respective localities. In this connection, it should be noted that the complainant New York Port Authority, whose jurisdiction includes the affected New York and New Jersey localities, has taken no position on where the produce market should be relocated. The Port Authority believes, however, that the decision as to relocation, when it is made, should not be between New Jersey points and points which the defendants by tariff publication have transferred to the Boston rate group.

We agree with the position of the complainants. The assailed rate disparities are large enough to influence the decision as to relocation of the wholesale produce market. The record shows that relocation of the Washington Market within the next few years at some other point in the metropolitan area is highly probable. The New Jersey interests, who oppose rate uniformity, obviously hope that the produce market will be relocated on their side of the Hudson River. They have pointed to New York's rate handicap as one reason for establishing a major produce terminal in northern New Jersey. A law recently enacted by the New Jersey Legislature (Chapter 18, P. L. 1960) author-
752 izes the establishment of a New Jersey Public Market Commission for the purpose of financing and operating a public produce market. Thus, if New York City should be adversely affected by the rate handicap, the Commission would be unable under section 3(1) to undo the damage. We conclude, therefore, that the powers conferred upon us by section 3(1) should be exercised so that the decision as to relocation of the Washington Market can be made in accordance with the tradition of rate equality which has existed for more than a century.

On reconsideration in No. 33105, we therefore find that the assailed rates on fresh fruits and vegetables are unjust and unreasonable and in violation of section 1(5) of the act, and that the assailed rates and charges are unduly prejudicial to the City of New York and unduly preferential to points in New Jersey located in the New York rate group, in violation of section 3(1) of the act. The findings in the prior report are modified accordingly.

In No. 33899, we find the rates on fresh fruits from origins in Colorado and Kansas to New York, N. Y., piers to be unjust and unreasonable and unduly prejudicial to the City of New York and unduly preferential to New Jersey stations within the New York rate group.

COMMISSIONER BUSH concurs in the result.

COMMISSIONER FREAS, dissenting:

I would affirm the prior report. In my opinion, complainants have plainly failed to make a case. The majority, in finding to the contrary, has read the words "undue or unreasonable" out of section 3(1) of the act.

The equality of treatment contemplated by section 3(1) depends upon whether transportation conditions here entitle New York City to rate equality; as the prior report indicated, considering costs, services, and possible resulting damages, they manifestly do not. Such treatment does not depend upon whether New York City needs protection in order to compete. Moreover, an action by port interests to compel equalization and voluntary action by carriers to establish it have always been viewed as fundamentally different. *New York Central R. Co. v. United States,* 99 F. Supp. 394, 399 (D. Mass. 1951), *aff'd per curiam, Interstate Commerce Commission v. New York Central R. Co.,* 342 U.S. 890. Yet, the finding of what is nothing
753 more than potential discrimination [8] would obliterate that distinction. Indeed, speculative discrimination would be a more apt characterization of the finding.

As to the section 1 allegation, the majority follows a concept of relative unreasonableness. As indicated in the prior report, that concept cannot be considered under Section 1. *Southern Wyoming Coal Operators Assn. v. C., B. & Q. R. Co.,* 264 I.C.C. 593, 623-24; *Southeastern Assn. of R. & Util. Commrs. v. A., T. & S. F. Ry.,* 321 I.C.C. 519, 545. Questions of rate relationships must be decided under sections 2 or 3., *Foye v. Atchison, T. & S. F. Ry. Co.,* 255 I.C.C. 466; *New York v. United States,* 331 U.S. 284, 344 (1947). However, a section 3(1) finding does not in itself establish that rates are unjust and unreasonable under section 1; and, in view of the cost evidence of record, a finding

8. But see *Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co.,* 314 I.C.C. 5, 49, and *All Commodities, New York to Baltimore and Washington,* 319 I.C.C. 627, 630, wherein the Commission indicated that it does not ordinarily act in such an area.

in the latter respect is not shown to be justified. In this regard, it is noted that the Commission has recently had set aside an order whereby it required cancellation of increased charges which still failed to meet out-of-pocket costs. *Pennsylvania R. Co. v. United States,* 216 F. Supp. 199 (E.D. Pa. 1963).

COMMISSIONER HUTCHINSON, dissenting:

The majority places great reliance on the fact that the higher rates and charges apply to all stations in New York City and on the fact that there is little evidence of record relating to deliveries at New York stations other than the piers. The theory of the report seems to be that the absence of a substantial amount of evidence with respect to the stations in New York City other than the piers is attributable to defendants, who must affirmatively demonstrate the lawfulness of all the rates and charges. Thus, the majority report appears to shift the burden of proof to the defendants.

The real issue here is the lawfulness of the rates and charges applicable on movements to the pier stations, on the one hand, and movements to the New Jersey stations, on the other. As found in the majority report, representative movements to the pier stations entail approximately $50 more expense (station plus terminal costs) than representative movements to New Jersey. There is, therefore, a substantial difference in *transportation* circum-
754 stances and conditions surrounding the respective movements justifying different treatment. There is no sound basis for a determination that the assailed rates and charges, which are conceded to be below out-of-pocket costs, are unlawful in any respect.

The report adopts the concept of relative unreasonableness in finding a violation of section 1(5) of the act. This concept, however, was expressly rejected in *Southeastern Assn. of R. & Util. Commrs. v. A., T. & S. F. Ry.,* 321 I.C.C 519 The report also concludes that a section 3(1)

violation has been established, apparently on the extremely speculative proposition that the Washington Market might be relocated in the future. However, this longstanding threat to relocate the Market cannot take the place of the evidence necessary to prove a violation of section 3(1), i.e., a clear showing of disadvantage or injury.

I do not believe that the complainants have sustained their burden of proof. The complaint should accordingly be dismissed and the investigation discontinued.

COMMISSIONER HERRING, dissenting:

I cannot agree with the majority. Here the defendants maintain, and in my opinion they have shown, that their revenue needs are so great that they can no longer afford to extend the benefits previously derived from the practice of rate equalization. I agree that the defendants should not be free to impose unjustifiably a rate handicap on part of the area involved, and thereby dictate as to the location of the new produce terminal; but neither should others be free to impose a burden on the defendant railroads merely to continue a century old tradition of rate equality.

The majority recognizes that the differentially higher rates and charges fail to recover even the out-of-pocket costs involved in performing the service in question. Their condemnation of these rates results in an unwarranted interference with managerial discretion. Moreover, they are negating our admonitions in Ex Parte No. 206, *Increased Freight Rates, E., W., and S. Territories 1956,* 300 I.C.C. 633, at page 687, wherein we stated:

> We have heretofore suggested that the time had probably come when consideration should be given to ways of increasing rates other than by horizontal increases. The carriers should give consideration to this suggestion. If tariffs are filed as outlined herein, they should reflect the results of this consideration.

755 I agree with that portion of the report which states:

> the practice of rate equalization should not be required merely for the sake of tradition, but only if the benefits resulting from the practice are substantial and in the public interest.

The facts in this case substantiate neither the benefits nor will the majority's holding be in the public interest.

CHAIRMAN GOFF dissents.

It is ordered, That the defendants named in the complaint in No. 33105 and the respondents in No. 33899 to the extent they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before April 8, 1964, and thereafter to abstain from practicing the unlawfulness found in said report to exist.

It is further ordered, That said defendants and respondents according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before April 8, 1964, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates, charges, regulations, and practices which will prevent and avoid the undue prejudice and preference found in said report to exist.

And it is further ordered, That this order shall continue in force and effect until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX

DOCKET NO. 33105, PORT OF NEW YORK AUTHORITY, ET AL. v. ABERDEEN AND ROCKFISH RAILROAD, ET AL.

Basis of revising station costs as between extraordinary services at New York piers 27-28-29 and what railroad would have to furnish as regular station service

The railroad furnishes station facilities in connection with the line-haul rates. At New York all of these costs at the pier stations are assigned as delivery cost solely peculiar to that operation and not required under
756 normal station services covered in the line-haul rates.

Data of record do not permit precise allocation of the costs of delivery on this basis. However, an estimate of what is delivery cost at the New York piers and costs of normal station services has been made as follows:

Maintenance of station and office buildings.—Float repairs of $53.59 are believed to be applicable to placing car to the point where the consignee can get to it and should not be assigned to pier costs.

Items listed as "all others" are believed to be partly applicable to repairs to station facilities that would be furnished in connection with any line-haul service. In the absence of any apportionment factor one-half of this expense has been charged to pier delivery cost and one-half to station expense. Allowances for vacation and holiday costs, payroll taxes, health and welfare costs, overhead and material costs have been adjusted in accordance with the labor charges.

A/C 373. station employees.—A part of this expense would be incurred in connection with normal team track delivery, but on this record the amount cannot be determined. However, it is thought that while the import fruit is on the piers, police protection would be required and a

portion of the policing cost based on equivalent cars handled should have been assigned to that traffic, resulting in lower delivery costs of rail shipments. The same comments apply to platform clerks.

Cleaning.—The railroad would incur some expense cleaning around team tracks after cars of perishable traffic had been unloaded so all of the cleaning cost cannot be said to be due to pier delivery. It is not possible to estimate this amount so the cost assigned as being attributable to pier delivery instead of team track delivery cannot be determined. However, it is believed that the use of the facilities by importers requires some cleaning and a percentage of this expense based on equivalent carloads handled has been assigned to that traffic. Gearman and dock labor is believed to be in connection with the placing of car floats which is the placing of cars where the consignee has access to them and, therefore, is the equivalent of team track placement.

Supplies (station).—A part has been assigned by the railroad to Auction Rooms and the remainder ($12,589.98) to Delivery. This item includes cleaning supplies as well as other station supplies, excluding stationery, and since cleaning labor has been adjusted to place a part of that expense to the Import Fruit traffic, this item of expense should be adjusted accordingly.

Fire protection.—The part of the piers along which the car floats are placed and thereby the cars are made available to the consignees are the equivalent of team tracks and driveways at stations. The part of the piers consisting of covered sheds upon which the fruits and vegetables are placed is a facility peculiar to pier delivery at New York. In the absence of data one-half of the fire protection cost is assigned to each portion of this facility.

Telephone—Is considered a regular station expense.

Light and power—A part of this cost would be supplied at team tracks and the usual station and agent's offices. In

the absence of a separation of this expense one-half is assigned to regular station services and one-half to pier delivery service.

Water—Is considered a regular station expense.

757 *Heating*—An estimated 5 percent of this expense is incurred in the agent's office and also some heat is believed to be furnished the shed portion of piers for Import Fruit display. Adjustments of delivery costs have been made on the above basis.

Pier rental.—On the basis that the pier portion of this facility corresponds to team track delivery and the shed portion to delivery peculiar to the New York service, the rental cost is assigned equally to these services. The reduction in New York delivery costs also results in a lesser amount of rental being assigned to Import Fruit handling.

Agents and general foreman and clerks (station).—On the basis that station force would have to be maintained for normal delivery, one-half of the cost of these employees is assigned to the New York Pier service and one-half to regular station delivery.

Billing Bureau.—Billing costs are applicable to all shipments and are required in connection with the line-haul rates so none has been assigned to pier delivery.

Remove rubbish.—All expense charged to New York delivery. Some rubbish removal would be required if regular team track delivery was made, however, from data of record this amount cannot be estimated. However, the use of the pier shed facilities by Import Fruit is believed to result in rubbish to the same extent as use of these facilities by nonimport traffic and a proportionate amount has been apportioned to the import traffic.

Cooperage.—Twenty-five percent of the total cost was assigned to the accessorial service of unloading and sorting. From the remainder $14,667.16 was deducted account billings to five southern railroads, for their proportion as a result of their handling fruit and vegetable shipments

terminated at the pier station. While these railroads were assessed on the basis of their handling the line-haul movement, no amount was deducted for the line-haul movement between Potomac Yard, Virginia, and New York via the Pennsylvania Railroad. Also, no credit was made for shipments from Texas, California, or other origin points. The Pennsylvania would also handle these shipments in line-haul service from the junction points, such as East St. Louis and Chicago, to New York. The amount billed to the five southern railroads is 13.3 percent of the total costs and it is believed that a minimum of this amount should be deducted from the delivery costs charged to New York.

Railroad perishable inspection agency.—Inspection agencies are normally in connection with regular railroad services and it is not believed proper to assign this expense solely to pier delivery at New York.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE PENNSYLVANIA RAILROAD COMPANY, et al., *Plaintiffs* v. UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 35250 (Filed: June 15, 1965)

ORDER

After full hearing and pursuant to the opinion of the court filed herein, the plaintiffs are denied relief and their complaint is dismissed.

WILLIAM H. HASTIE
William H. Hastie
Circuit Judge

RALPH C. BODY
Ralph C. Body
District Judge

A. LEON HIGGINBOTHAM, JR.
A. Leon Higginbotham, Jr.
District Judge

Dated: June 16, 1965

APPENDIX E

A. Section 1(5) of the Interstate Commerce Act, 49 U.S.C. § 1(5), provides:

> (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. § 3(1) provides:

> (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15(1), provides:

> (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this

part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

B. Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b) provides:

> (b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) provides:

> (e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX F

List of Appellants

Akron, Canton & Youngstown Railroad Company (The)

Ann Arbor Railroad Company (The)

Baltimore and Ohio Railroad Company (The)

Central Railroad Company of New Jersey (The)

Chicago & Eastern Illinois Railroad Company

Grand Trunk Western Railroad Company

Lehigh Valley Railroad Company

Pennsylvania Railroad Company (The)

Reading Company

Richmond, Fredericksburg and Potomac Railroad Company

Western Maryland Railway Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 556

THE PENNSYLVANIA RAILROAD CO., ET AL., *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Port of New York Authority and The City of New York, complainants before the Interstate Commerce Commission and intervening defendants in the District Court, move that the judgment of the District Court be affirmed.

QUESTION PRESENTED

On hauls ranging up to 2,035 miles—and generally exceeding 1,000 miles—on carloads of fruits and vegetables from the South and Southwest, did the Interstate Commerce Commission (upon complaint and following hearings) act lawfully in requiring the railroads to maintain uniform line-haul rates to all stations within the long-established New York terminal rate group; the Commission expressly leaving the railroads free—

(a) to increase the general level of their rates and charges;

(b) to choose such level as they preferred for the uniform rates; and

(c) to assess special additional charges for any accessorial services and facilities provided.

STATEMENT

This is a direct appeal from a judgment (J.S. 57a) of a three-judge district court dismissing appellants' suit to set aside an order of the Interstate Commerce Commission entered in *Port of New York Authority and City of New York* v. *Aberdeen & Rockfish R. Co., et al.* (321 I.C.C. 738) (J.S. 30a). The order of the Commission is found at page 52a of the Jurisdictional Statement. The opinion of the district court begins at page 1a thereof.

Appellees are the Pennsylvania Railroad Company and ten other northern railroads. Two northern railroads, New York Central Railroad Company and Erie-Lackawanna Railroad Company, favor uniform rates to all stations in the New York terminal rate group.

They took this position in the Commission proceeding and intervened in the court proceeding herein in support of the Commission's order. The complaint of The Port of New York Authority and City of New York named as defendants 396 railroads participating in tariffs providing rates for the transportation of carloads of fruits and vegetables from the South and Southwest to the New York terminal rate group, i.e., the urbanized New York metropolitan area. The southern and western railroads did not defend the rates complained of and took no part in the Commission or court proceedings.

A fundamental and universal feature of the railroad freight rate structure in the United States, a feature which has existed practically since the beginning of railroad transportation, is the maintenance of terminal rate groups, that is, on long-haul traffic the application of uniform rates to and from all stations in the same town, city or urbanized metropolitan area. The New York terminal rate group, embracing all railroad stations in both New York and New Jersey in the New York metropolitan area, has existed for over a century and has been repeatedly approved and its maintenance required by the Commission. (321 I.C.C., at pages 746-748; J.S. 41a-43a) The splitting of a terminal rate group is a violation of first principles. No terminal rate groups—

> "should be so delimited as to separate stations constituting a single industrial or commercial community." *Consolidated Southwestern Cases,* 205 I.C.C. 601, 637 (1934); *Eastern Class Rate Investigation,* 164 I.C.C. 314, 415 (1930); *Western Trunk-Line Class Rate Investigation,* 164 I.C.C. 1, 197 (1930)

The urbanized New York and New Jersey area making up the New York metropolitan area has been repeatedly found by the Commission to "constitute a single community." (321 I.C.C. at pages 747-748; J.S. 42a-43a)

In the present case, as in earlier cases, the Commission found: "Both the commerce of the country and the general public interest require the continued maintenance of such terminal groups as the New York, Hampton Roads, San Francisco, Chicago, and St. Louis groups." (321 I.C.C. at pages 748, 749; J.S. 44a, 45a)

The complaint of the Port Authority and City of New York here involved assailed as unlawful the rates on fruits and vegetables to the New York metropolitan area from the South and Southwest, charging that the rates were unjust and unreasonable in violation of Section 1 and unduly prejudicial and preferential in violation of Section 3 of the Interstate Commerce Act. The gravamen of the complaint was that to stations in the New York metropolitan area located in New York City defendants were maintaining higher rates than they applied on the same traffic when delivered to stations in the same metropolitan area located in New Jersey. Illustrative of the rates assailed were the recently established per-car rates from Florida on vegetables, and mixed cars of fruits and vegetables. Representative rates were $400.00 per car to stations in New Jersey and $457.00 to stations in New York City. A haul of 1,271 miles from Florida to New York is involved in transporting the traffic under these representatives rates. (J.S. 26a)

All cities and metropolitan areas contain numerous railroad freight stations. For example, the Phila-

delphia terminal rate group "includes 100 freight stations, in addition to lighterage points, separated from each other in some instance by as much as 26 miles." *Eastern Class Rate Investigation,* 164 I.C.C. 314, at page 447. The New York terminal rate group contains 125 stations of which 25 stations are located in New York City and 100 stations in New Jersey. (321 I.C.C. at page 739; J.S. 31a)*

In transporting the fruit and vegetable traffic from the South and Southwest to the New York terminal rate group, the hauls from the Southwest range up to 2,035 miles (J.S. 29a) and from the South they generally exceed 1,000 miles and range up to 1,308 miles. (J.S. 26a, 27a, 28a) It is thus obvious that on shipments to the New York terminal rate group all but a minuscule fraction of the transportation is *identical* whether the car is delivered to one or another of the stations in the terminal rate group. The Commission, upon analysis of defendants' cost evidence, found a relevant difference of $14.14 per car in the "terminal" cost of delivery at representative New Jersey stations and at the Pennsylvania Produce Terminal station on Manhattan (Piers 27-28-29). (J.S. 36a, 37a) This

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* The record before the Commission contains detailed testimony and detailed maps showing railroad lines and terminal facilities in, and the size and topography of the area embraced in, the terminal rate groups at the following major cities: San Francisco, Philadelphia, Baltimore, Norfolk-Newport News, Cincinnati, Louisville, St. Louis, Boston, and Chicago, as well as New York. (Tr. 101-143; Exs. Nos. 26 through 48) This evidence shows that the New York terminal rate group cannot be distinguished topographically, or as to size, or from the standpoint of railroad transportation, or otherwise, from the other major terminal rate groups in the country.

was the only station in New York City for which the railroads supplied cost figures. The Commission found:

> "On this record we do not regard the $14.14 per-car difference in terminal costs as controlling. Cost differences of that degree may be found to exist as between stations in any large rate group." (321 I.C.C. at pages 744-745; J.S. 38a)

The Commission further observed that variations in rates to a given terminal rate group reflecting such variations in cost would produce "a choatic rate situation," "the result could only be confusion and an impractical and unworkable rate structure;" and that if such variations in costs were to be reflected in the rates—

> "the entire rate structure of the country would have to be remade." (321 I.C.C. at page 748; J.S. 43a)

It was pointed out by the Commission that under defendants' theory they could publish "125 different rates on each of the four major movements" to the one terminal rate group. This the Commission regarded as ridiculous in the extreme and as plainly demonstrating the unsoundness of the railroads' position. (321 I.C.C. at pages 749-750; J.S. 45a)

The higher rates complained of applied to all 25 stations in New York City; but defendant railroads restricted their cost evidence to operations in serving only one of these stations, namely, the Pennsylvania Produce Terminal (Piers 27-28-29). The Commission found, and the defendant railroads in their testimony had emphasized, that the Produce Terminal is "actually a market place for the produce industry" and that the facilities and services provided by the railroads at this

station "greatly exceed those provided at an ordinary freight station." (321 I.C.C., at page 740; J.S. 33a) The terminal is cooled in warm weather and heated in winter; auction rooms are provided; and "Floor space is assigned for each car and the contents thereof are sorted and displayed for prospective buyers." (*ibid.*)

The Commission found that the greater part of the "station" costs shown for this one station were "extraordinary" and related to accessorial rather than normal transportation services. (321 I.C.C. at page 745; J.S. 38a) It therefore concluded:

> "Furthermore, the cost of providing extraordinary services and facilities at one New York station (Piers 27-28-29) affords no justification for the imposition of higher rates and charges at other New York stations where no such pier services are performed."

The traffic importance of the 24 stations in New York City other than the Pennsylvania Produce Terminal is shown by the Commission's finding that "1,100 cars of vegetables subject to the $57 per-car [higher] charge were delivered at stations east of the Hudson River other than the piers" whereas 542 such cars were delivered at the piers. (321 I.C.C. at page 741; J.S. 34a) "However, twice as many carloads of vegetables were delivered to New York stations other than piers 27, 28 and 29, on which differentially higher rates also applied." (318 I.C.C. at page 472; J.S. 14a)

The 8,000,000 people living in the City of New York consume a large volume of fresh fruits and vegetables, the total from all origins amounting in the aggregate to an annual volume equal to "a train more than 1,500 miles in length." (Tr. 163, 161) This large volume of

perishables is handled by a wholesale trade located in the City of New York and consisting of "some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables." (318 I.C.C. at page 472; J.S. 14a) The Commission found that the very substantial rate differences favoring the New Jersey municipalities as compared to New York City could well cause the removal of the wholesale trade from New York City to New Jersey. (321 I.C.C. at page 751; J.S. 48a) This wholesale trade, sometimes referred to in the Commission reports as the "wholesale market," is not one organization and is not an institution or a group over which the City of New York has any managerial or proprietary control. The wholesale trade consists of numerous individual merchants who are motivated by normal economic and business considerations and who could be induced to remove their businesses to those parts of the metropolitan area which the railroads choose to favor by lower freight rates.

The Commission reports and order. Following hearings on the complaint, the Commission's Hearing Examiner issued his report finding the rates unreasonable and unduly preferential and prejudicial as charged. Thereafter, Division 2 of the Commission, consisting of three Commissioners, by a vote of two to one, reversed the Examiner and dismissed the complaint. In its report Division 2 had disregarded the decision of this Court in *New York* v. *United States,* 331 U.S. 284, 308, 315, relating to undue prejudice and preference of regions and localities; and also the decision of this Court in *Baltimore & Ohio R. Co.* v. *United States,* 345 U.S. 146, 148-149, relating to the unreasonableness of freight rates. On reconsideration the Commission, by a vote of seven to four, observed and ap-

plied the cited decisions of this Court and found the rates complained of unreasonable in violation of Section 1(5) and unduly preferential of the New Jersey municipalities and unduly prejudicial to the City of New York in violation of Section 3(1) of the Act to the extent that higher rates were maintained to stations in New York City than to the New Jersey stations in the same terminal rate group.

By the Commission's order the railroads were directed "to cease and desist . . . from practicing the unlawfulness found" and to publish and maintain rates "which will prevent and avoid the undue prejudice and preference found in said report to exist." (J.S. 52a) No particular rate or rate level was fixed in the order or report. The Commission expressly stated in its report that "there is no apparent reason why the practice of rate equalization [within the terminal rate group] should be inconsistent with the revenue needs of the defendants;" and then explained how the equalization of the rates might be accomplished by raising rates rather than by lowering them. Furthermore, the Commission expressly indicated its approval of increased accessorial charges and additional accessorial charges for the "extraordinary" services and facilities provided at the Produce Terminal. (321 I.C.C. at page 750; J.S. 46a)

Opinion of the district court. Upon basis of a detailed analysis of the Commission's decision, the district court, in a unanimous decision, upheld the Commission's order. In the course of its opinion, it said:

> "Thus, the Commission had to resolve a conflict between the legitimate concern of the carriers, claiming urgent need to reduce losses, and the public interest in rate parity throughout the metro-

politan area. In these circumstances, the Commission properly considered whether the carriers' need for more revenue could be met by means other than breaking the rate group." (J.S. 5a-6a)

The district court concluded "that the Commission's order is adequately supported by a justified conclusion that unnecessary and undue preference and prejudice to geographic subdivisions of the New York metropolitan area is caused by the rate differential in controversy." The court found it unnecessary to consider the Commission's additional finding that the rates were unjust and unreasonable. (J.S. 8a)

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court.

The following opinions of this Court have firmly settled all pertinent principles of law:

Ayrshire Collieries Corp. v. *United States,* 335 U.S. 573; holding that the determination of proper rate groups "is a task peculiarly" for the Commission and not for judicial determination, that the Commission has "broad discretion" in the matter, and that the Commission is not bound by costs but may give consideration and weight to providing equality of competitive opportunity. (335 U.S. at pages 586-587, 590-591, 592, 593)

Illinois Commerce Commission v. *United States,* 292 U.S. 474; holding: "Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission." And, further, that the Commission is not controlled by costs. (292 U.S. at page 486)

Virginian R. Co. v. *United States,* 272 U.S. 658; holding that the Commission has power under both Section 1 and Section 3 to require the inclusion of excluded stations within a rate group despite the "depressed" level of the rates involved. (272 U.S. at pages 662, 665-666)

Baltimore & Ohio R. Co. v. *United States,* 345 U.S. 146; holding that despite the admission that the rates prescribed as "maximum reasonable" were below the cost of performing the transportation, the Commission had acted validly because: "The carload rates prescribed are but minor alterations in a vast, complex network of rates that apply to fresh vegetable shipments throughout the Nation. * * * The present rate order is but one of a long series of Commission orders designed to correct defects and injustices that develop from time to time in the general fresh vegetable rate pattern." (345 U.S. at pages 148-149)

New York v. *United States,* 331 U.S. 284; holding that an unjustified discrimination in rates against a region constitutes a "trade barrier" offensive to "the great purposes" of Section 3; that such rates "impede established industries" and "prevent the establishment of new ones;" and, accordingly, may be struck down even in the absence of any evidence that particular individual concerns suffer prejudice. (331 U.S. at pages 308, 315)

Appellants' argument as to similarity of transportation conditions. The principal argument and almost entire basis advanced by appellants in support of their appeal is that to sustain a finding of undue prejudice it must be shown "that transportation conditions to the point alleged to be preferred are substantially similar to those to the point alleged to be prejudiced." It is

said that the Commission did not make the necessary finding or have the required evidence to this effect. (J.S. 16-20)

This argument must be viewed as disingenuous in the extreme or, in the alternative, as advancing the discredited contention, repeatedly rejected by this Court, that any variation in costs in serving different stations within a rate group warrants a difference in rates.

The argument appears to be disingenuous as applied to the present case. The transportation under the rates involved ranged up to 2,035 miles from the Southwest and generally exceeds 1,000 miles from the South. (318 I.C.C. at pages 481-484; J.S. 26a-29a) The transportation service performed at origins in Texas and Florida is *identical* regardless of the station to which it is delivered in the New York terminal rate group. Similarly, on the long hauls of 2,000 miles from Texas and of over 1,000 miles from Florida, all but a minuscule fraction of the total transportation is not only obviously "substantially similar," it is *identical,* whether the freight is delivered in the New York terminal rate group at one of the New Jersey stations or at one of the stations in New York City. The only variation to be found is in the terminal services within the New York terminal rate group. And the only relevant variation in transportation service found by the Commission in defendants' evidence was represented by a cost difference of $14.14 per car which the Commission found to be not "controlling." (321 I.C.C. at pages 744-745; J.S. 38a)

Appellants' argument, when alternately viewed, amounts to a contention that the Commission may not require uniformity of rates within a rate group under Section 3 where *any* variation of costs is shown in

serving different stations. This argument is completely answered by the Commission's conclusions that, if accepted, it would lead to "a chaotic rate situation," "confusion and an impractical and unworkable rate structure," and would require "that the entire rate structure of the country would have to be remade." (321 I.C.C. at page 748; J.S. 43a) It is also directly answered by the decisions of this Court in *Ayrshire,* in *Illinois Commerce Commission, and in Virginian, supra.*

Burden of Proof. Appellants contend that complainants, and not the railroads, had the burden of showing the costs and transportation conditions involved in serving the 24 stations in New York City other than the Produce Terminal. (J.S. 14) Such information is peculiarly within the competence and control of the railroads and is not available to anyone other than the railroads. Accordingly, from the beginning it has been an established rule that the burden of proof in such matters is upon defendant railroads. See *H. McMorran and E. R. Harrington* v. *G. T. R. Co. Can.,* 3 I.C.C. 252, 261 (1889). A recent ruling to this effect is found in *Cudahy Packing Co.* v. *Akron, C. & Y. R. Co.,* 318 I.C.C. 229, 245-246. The latter case was appealed to the courts and the Commission's ruling as to burden of proof was specifically considered and expressly upheld. *A. T. & S. F. Ry. Co.* v. *United States,* 218 F. Supp. 359, at pages 374 (1963).

In the Commission proceeding, complainants made their *prima facie* showing when they presented, among other evidence, the abnormal and extraordinary disparity in charges for deliveries at different stations within the same metropolitan area and long-established terminal rate group. Defendants presented no justification for the higher charges to the 25 stations within

New York City, confining their defensive evidence to the costs of serving one station, the Produce Terminal, which admittedly is wholly unrepresentative and "extraordinary."

Truck competition. Appellants point to the fact that the rates involved were established to meet truck competition. (J.S. 18) But railroads may not publish reduced rates to meet truck competition for some shippers or receivers and not for others similarly situated, without violating Section 3. *Norcross Bros.* v. *Pennsylvania R. Co.,* 210 I.C.C. 629, 633; 220 I.C.C. 407, 411; *Petroleum and Petroleum Products,* 245 I.C.C. 33, 38; *National Water Carriers Assn.* v. *Long Island R. Co.,* 287 I.C.C. 726, 730. The Commission record is clear that the truck competition is "mainly to the New York part of the metropolitan area." (Tr. 80) The railroads did not deny or even question this fact.

The Commission's analysis of appellants' cost evidence. In a secondary argument (J.S. 20-22) appellants contend that the Commission acted "without evidence" in analyzing and separating into "ordinary" and "extraordinary" the cost figures presented by the railroads as to the services and facilities provided at the Produce Terminal.

This argument, like appellants' principal argument, is disingenuous. The Commission might have rejected, as did the Hearing Examiner (J.S. 37a), the railroads' cost showing on the ground that the figures presented failed to show the necessary separation or breakdown as between the costs of "ordinary" station services and the "extraordinary" accessorial services and facilities at the Produce Terminal. Instead of rejecting them as flawed and unacceptable, the Commis-

sion, in the interest of the railroads themselves, analyzed the faulty figures and, although hampered by the form of defendants' evidence, developed accessorial costs at the Produce Terminal which the Commission stated might well justify additional accessorial charges. By its analysis the Commission handed the railroads a notable victory by authorizing them to recover $36.82 of their costs at the Produce Terminal by new and special charges. (321 I.C.C. at pages 745, 750; J.S. 39a-40a, 46a) The Commission's analysis of the railroads' cost figures, of which appellants complain, relates solely to the "station" costs at the Produce Terminal. (231 I.C.C. at pages 745, 755-757; J.S. 39a, 53a-56a) Appellants' argument is not applicable to the "terminal" cost difference of $14.14. This difference was derived by a simple comparison of the "terminal" cost figures shown in the railroads' own cost evidence. (321 I.C.C. at page 743; J.S. 36a)

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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October 8, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 556

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America, the Secretary of Agriculture and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

In a complaint filed with the Commission on June 24, 1959, the Port of New York Authority and the City of New York attacked as unjust and unreasonable, in violation of Section 1(5) of the Interstate Commerce Act, and unduly prejudicial and preferen-

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tial, in violation of Section 3(1) of the Act, the maintenance by several railroads of certain per-car charges and rates on vegetables and fruits from southern and southwestern territories to stations in New York, N.Y. These charges were alleged to be higher than the corresponding rates and charges to points in New Jersey located within the New York terminal rate group. The rates to the New York and New Jersey points, which were within the same rate group, had been identical, but the challenged New Jersey rates were lowered to enable the railroads to regain traffic from unregulated motor carriers (J.S. 32a).

The hearing examiner concluded that the rates were unlawful, as alleged. A division of the Commission held, however, that the rates were reasonable and not prejudicial, and it dismissed the complaint. The entire Commission, on reconsideration, concluded that the rates were unreasonable and prejudicial. It ordered appellants to discontinue the unlawful rate structure. The three-judge district court affirmed the Commission's order insofar as it was based on the finding of prejudice.

The evidence before the Commission related primarily to the per-car charges on vegetables and on vegetables and fruits in mixed cars from South Florida points to the New York City stations. These per-car charges under the challenged rates are $57 higher to all New York City stations than the corresponding charges to New Jersey points, which are approximately $400 per carload (J.S. 2a). A uniform line-haul rate on long-haul traffic to all points and stations

within the New York rate group had long been maintained by the carriers without regard to any unusual operating conditions at particular stations within the group (J.S. 13a).

Appellants introduced evidence to show a cost differential between the 25 New York and the 100 New Jersey stations. The evidence of higher New York City costs related principally to one New Jersey station and to one station consisting of three New York City piers (J.S. 14a, 34a). The New York station (the "Manhattan piers") had facilities not ordinarily found in a freight station. "The piers are heated to protect the produce during the winter and overhead blowers ventilate the area in warm weather. Auction rooms are lighted, heated, and maintained by the railroads. Floor space is assigned for each car and the contents thereof are sorted and displayed for prospective buyers" (J.S. 33a).

The Commission found that there was a cost differential of $63.25 (J.S. 36a–37a), but it concluded that insofar as this reflected higher "terminal" costs [1] it was not greater than the disparity found among stations in other large rate groups (J.S. 38a). With respect to "station costs," [2] the Commission deter-

[1] The Commission defined "terminal costs" as the "costs incurred between completion of the line-haul rail movement and the placement of cars in a position where they are accessible to consignees" (J.S. 36a).

[2] "Station costs," the Commission noted, include "all costs associated with delivery excluding, of course, the terminal costs noted above and the cost of unloading and sorting at the New York piers, for which service an unloading charge is imposed" (J.S. 37a).

mined that $36.82 were "extraordinary" costs which could be recovered where the special services were offered through accessorial surcharges, which would not upset the basic group rate (J.S. 46a).

The Commission also based its decision on the long tradition of treating northern New Jersey and New York City as a single community with respect to railroad rates. It noted a competitive consideration which it deemed especially important here—the effect of the rate differential on the selection of a new site for the Washington Street Market, which served some 200 wholesalers, jobbers, and brokers of fresh fruits and vegetables, and is now located in Manhattan and served by the Manhattan piers. The Commission found that a change of the market site was probable; that New York City and the communities in northern New Jersey favored by the rate differential were competing for it; that the rate differential was large enough to influence the decision as to the relocation; and that the decision as to relocation, when made, should not be affected by a differential in rates (J.S. 47a).

The district court found that there were significant general considerations in favor of maintaining the rate group and that the Commission's findings with respect to the Washington Street Market were supported by the record (J.S. 4a–5a). The court observed that the Commission was called upon to resolve "a conflict between the legitimate concern of the carriers, claiming urgent need to reduce losses, and the public interest in rate parity throughout the metro-

politan area," and it held that "the Commission properly considered whether the carriers' need for more revenue could be met by means other than breaking the rate group" (J.S. 5a–6a). The court found no basis in the record for challenging the Commission's findings that alternative methods of cost recovery were feasible (J.S. 6a–7a), and it sustained the Commission's finding that the rate differential violated Section 3(1) of the Interstate Commerce Act (J.S. 8a).

ARGUMENT

The decision of the court below was correct, and this appeal presents no question warranting plenary consideration by this Court.

1. The district court properly held that it was the Commission's responsibility to balance competitive and other considerations against the cost differential in determining whether appellants were justified in splitting the metropolitan rate group. It is well-settled that the practice of establishing group rates requires an accommodation between conflicting public and carrier needs, and that cost factors are not necessarily controlling. In *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, this Court held that in grouping stations and fixing rate differentials between station groups, the Commission could consider the desirability of maintaining competitive opportunity among shippers so long as it also took account of differing transportation conditions. See 335 U.S. at 586–587, 592. The fact that the prejudice was not felt by individual shippers (as in *Ayrshire*) but by

the New York City community did not affect its validity as a factor for the Commission's consideration. This Court has held that Congress intended "to make regions, districts and territories, as well as shippers, the beneficiaries of its anti-discrimination policy expressed in Section 3(1)". *New York* v. *United States,* 331 U.S. 284, 308 (1947). There is, therefore, no merit to appellants' contention that the Commission could find undue prejudice only if there was substantial similarity of transportation conditions (*i.e.,* costs) among the stations in the metropolitan group.

2. The remaining arguments made by appellants concern the validity of the cost findings in this proceeding. These contentions have no significance beyond the facts of this case, and are, in any event, unsound.

a. Appellants claim that the Commission disregarded a $12.29 differential in "normal delivery" costs (J.S. 13). Although the Commission did not specifically mention this differential, its decision shows that it was aware of the total cost differential at the Manhattan piers, and it concluded that this amount was insufficient to outweigh the factors favoring the grouping of the New Jersey and New York stations. The district court also did not specifically advert to this differential, which amounted to only about 3 percent of the total long-haul rate. We submit that the general considerations relied upon by the district court to sustain the Commission's order are not affected by evidence of an added small cost of this sort.

b. Appellants also argue that the proper cost factors, namely the costs of the projected service to Hunt's Point, the new location of the old Washington Street Market, were not considered by the Commission (J.S. 16–17). There is no merit to this contention because the question before the Commission was whether the rate differential then in effect was prejudicial to New York City. We do not read the Commission's order as precluding appellants from filing new rates for long hauls to Hunt's Point when service to that location begins on a regular basis. The lawfulness of those rates will present a separate question not decided here, and appellants may then introduce cost data relevant to that service.

c. Appellants finally attack the apportionment of "station costs" under the misapprehension that the purpose of such apportionment was to ascertain "the cost of making team track delivery" in New York (J.S. 20) so as to know the station costs at the site of the new produce market (J.S. 22). The Commission's purpose, however, was to discover whether a substantial part of the cost differential between the Manhattan piers and New Jersey could be recovered by an accessorial surcharge. From the context of the Commission opinion (J.S. 38a, 46a–47a), it is clear that "extraordinary station costs" reflect those services for which the Commission believed an accessorial surcharge might be imposed and that "normal delivery" costs reflect those services which must be covered by the line-haul rate. For this limited purpose, precise apportionment was unnecessary. All the Commission

sought to show was that a "substantial" amount of the station costs were recoverable, leaving a much smaller unrecovered cost differential to weigh against the factors favoring the group rate. Precision would be necessary only if and when a hearing were held to determine the lawfulness of a filed accessorial surcharge. Appellants are obviously not bound in any later proceeding by the Commission's estimate in this case.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 556.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OPPOSING MOTIONS TO AFFIRM.

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IN THE

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THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Appellants,

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UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OPPOSING MOTIONS TO AFFIRM.

I. The Motion of the United States, the Secretary of Agriculture and the I.C.C.

The Government argues (p. 6) that there is no merit to appellants' contention that the Commission could find undue prejudice only if there was substantial similarity of transportation conditions as between the points alleged to be preferred and those alleged to be prejudiced.

This is contrary to *United States v. Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *New York v. United States*, 331 U.S. 284, 315-316, 350 (1947); *State Corporation*

Comm'n of Kansas v. United States, 184 F. Supp. 691, 698 (1959), and *Atchison, Topeka & Santa Fe Railway Co. v. United States,* 218 F. Supp. 359, 366 (1963).

> "The rule, as stated in *United States v. Illinois Central R.R., supra,* at p. 524, is that
>
> > 'To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.' "

In *Atchison,* a very recent case, the Court stated at p. 366:

> "As plaintiffs have shown, and defendants [the United States and the Interstate Commerce Commission] do not dispute, both the Interstate Commerce Commission and the federal courts have ruled that undue prejudice or preference does not exist unless the transportation conditions with regard to the prejudiced and preferred points are substantially similar.
>
> "It follows that the correct test of 'undue' preference or prejudice is whether those circumstances exist under substantially similar transportation conditions; it also follows that a finding of such transportation conditions is essential to the Commission's authority to find a section 3 violation."

Illinois Central and *Atchison* were cited with approval on this point by this Court's decision of December 7, 1965 in *Western Pacific Railroad Company v. United States,* No. 12, October term, 1965. In construing the provision of Section 3(4) of the Act, relating to discrimination between connecting carriers, the Court stated:

"Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier. See *United States v. Illinois Central R. Co., supra,* at p. 521; *Atchison, Topeka & Santa Fe R. Co. v. United States,* 218 F. Supp. 359, 369."

The case upon which the Government principally relies for its contention is *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, 594 (1949). There, however, the Commission had made the precise finding that is lacking in the decision here under review:

". . . the Commission found that the transportation conditions over the single-line routes do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group. . . ." (335 U.S. at 586)

It is not contended by appellants that the Commission must determine the lawfulness of rate relations in exact accordance with cost relations. It may disregard minor variations in cost, but the rule has been that substantial similarity, to be found by the Commission, is requisite to an order commanding rate equality. It is obvious that there is a point beyond which the disregard of cost differences would be arbitrary.[1] This is especially true when rates are very low, as in the present case, where the rates under attack were found by the Commission to be below out-of-pocket costs. Such rates (like short-haul rates) do

1. The importance attached by this Court to the element of cost differences in applying anti-discrimination provisions is well illustrated by the decision in *I.C.C. v. Mechling,* 330 U.S. 567, at 577: "Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain" (J.S. 17, footnote.)

not yield sufficient revenue to permit of disregarding the greater expenses to the higher-cost point.

On page 5 of its Motion to Affirm, the Government says that in *Ayrshire* this Court held that in grouping stations and fixing rate differences between station groups, the Commission could consider the desirability of maintaining competitive opportunity among shippers "so long as it also took account of differing transportation conditions." In the present case, the Commission did not take account of differing transportation conditions as to the matter which controlled its decision, namely the supposed need to permit of the selection of a new location for the Washington Market on the basis of its having an equality of rates with all other points in the New York Metropolitan area (J.S. 48a).[2] This consideration was, inherently, one which would exclude consideration of comparative transportation conditions. The location of the new market place was unknown. Representatives of the City could not state where the new produce terminal would be located (Tr. 171). Indeed, as pointed out in the Jurisdictional Statement, counsel for the City and counsel allied with them took the position that transportation conditions to the site of a possible new produce terminal were immaterial (J.S. 17).

The Commission, therefore, made no finding of similarity of transportation conditions, and the record would not have permitted it to make such a finding.

None of these matters is denied in the Government's Motion to Affirm. Rather, taking note that the City has now decided upon the location (Hunt's Point) for its new terminal market, the Government states that it does not read the Commission's order as precluding appellants from filing

2. The Government concedes that this consideration was deemed by the Commission to be "especially important" (Motion p. 4) and the City of New York stated in its brief in the court below (R. 427) that the conclusion of undue prejudice ". . . was bottomed upon the disadvantage of New York City, as a locality, in competing with municipalities in the same commercial and urbanized metropolitan area for the relocation of the fresh fruit and vegetable market" (J.S. 10).

new rates to Hunt's Point when service thereto begins on a regular basis, that the lawfulness of those rates will present a separate question, not decided here, and that appellants may then introduce cost data relevant to that service (Motion p. 7). We shall comment on this statement *infra*. At this point, it is sufficient to notice that there is no challenge to the validity of the grounds of appellants' point concerning the lack of knowledge, consideration by the Commission, or finding, relating to comparative transportation conditions as between points alleged to be unduly preferred and a possible point at which a new produce terminal might be built by the City. Hence, even on the Government's statement of the rule (referring to the *Ayrshire* case) that the Commission may consider the desirability of maintaining competitive opportunity among shippers "so long as it also took account of differing transportation conditions," the Commission's order here must be held invalid; it did not take account of comparative transportation conditions in reaching its conclusion that a finding of undue prejudice should be entered so that the decision as to relocation of the Washington Market could be made on the basis of rate equality for any location that might be selected.

With respect to the comparative costs which the Commission did discuss, namely those in terminating produce at the Pennsylvania Produce Terminal (called the "Manhattan Piers" in the Government Motion) in relation to a typical New Jersey point, the Commission found, as the Government admits (Motion p. 3), that there was a cost differential of $63.25. This compares with rate differentials ranging from $33 to $57 per car (J.S. 12). It found also that all of the services embraced by the rates to the Pennsylvania Produce Terminal were lawfully included in such rates (J.S. 38a); hence the cost attributable to all such services was—as to this station—the relevant cost. It found also that no undue prejudice was shown to persons receiving shipments at that station (J.S. 47a). And even

the author of the majority opinion agreed that the City and its co-complainant failed to make out a case of undue prejudice from the standpoint of possible loss of tax revenue or employment (J.S. 22a). Hence, the only thing unaccounted for is the matter of the removal of the market. A finding of undue prejudice with respect to rates to the Pennsylvania Produce Terminal obviously could not have been based upon the necessity of rate equality to that point as a possible site for relocation of the produce market; the idea was to move the produce market away from that terminal. Yet the Commission found undue prejudice in the relation between the rates to this important station and those to a typical New Jersey station as to which it found transportation costs to be $63.25 per car lower.

In discussing the cost evidence, the Commission disregarded a difference of $14.14 in the cost of switching and floating to the Pennsylvania Produce Terminal as compared with switching to a typical New Jersey point—Henderson Street team tracks, Jersey City—on the ground that a difference of this amount may be found in any large rate group (J.S. 38a). It disregarded without explanation an additional difference of $12.29 between station costs at Jersey City and what it arbitrarily assigned as station costs for normal delivery at the Pennsylvania Produce Terminal (Appendix C, p. 37a). As to this, the Government states (Motion p. 6) that although the Commission "did not specifically mention this differential" its decision shows that it was aware of the total cost differential at the Produce Terminal "and it concluded that this amount was insufficient to outweigh the factors favoring the grouping of the New Jersey and New York stations." And it is argued that the "general considerations" relied upon to sustain the Commission's order are not affected by evidence "of an added small cost of this sort" (Motion p. 6). This, of course, views the $12.29 in isolation from other cost differences. The Commission had dismissed the $14.14 cost difference for switching and floating, as mentioned

above, on the ground that it was not unusual to find differences of this amount in any rate group. When $12.29 is added to that amount, there is, based upon these two factors alone, a difference of $26.43. The Commission did not say that such a difference may be found in any group. It just left the matter hanging. Moreover, the $12.29 differential in "normal delivery" costs resulted from a split of the station expenses by the Commission wholly without evidence, a matter to which we now turn.

The Government does not deny that the Commission made the apportionment of station costs between "normal delivery" and "extraordinary" costs without evidence. It says that appellants attack the Commission's apportionment of station costs under the misapprehension that the Commission's purpose in making the apportionment was to ascertain the cost of making team track delivery at New York so as to know station costs at the site of the new produce market, but that, in fact, the Commission's purpose was to discover whether a substantial part of the cost differential between the Manhattan piers and New Jersey could be recovered by an accessorial charge. The Government says that:

> "For this limited purpose, precise apportionment was unnecessary. All the Commission sought to show was that a 'substantial' amount of the station costs were recoverable, leaving a much smaller unrecovered cost differential to weigh against the factors favoring the group rate." (Motion p. 7)

Here, therefore, the Government is urging that while the Commission ascertained both costs (without evidence) it gave consideration to only one, that relating to a possible charge not in issue. The report in no way indicates that the Commission considered only the costs relating to such a possible charge and ignored that part of its apportionment which did relate to the rates in issue, the cost for ordinary

services under the line-haul rates. The Commission stated (J.S. 39a) that:

> "In view of the conclusions expressed above, it is necessary to determine whether the station costs of $62.65 are attributable solely to extraordinary pier services and facilities or whether a part of such costs would have been incurred in connection with ordinary station delivery."

Manifestly, it cannot properly be said that the Commission, in making the apportionment, had no interest in the cost for ordinary station delivery. This same conclusion is compelled by the title of the appendix in which the arbitrary cost apportionment was made (J.S. 53a) and by the statement of the Commission that an ". . . estimate of what is delivery cost at the New York piers and costs of normal station services has been made . . ." (J.S. 53a).

The statement that the Commission's purpose was to examine the extent of the extraordinary costs alone is the statement of counsel, not that of the Commission. The decision must be judged as it was written. *Securities and Exchange Comm'n v. Chenery Corp.*, 322 U.S. 194, 196 (1948). Moreover, the contention that the Commission considered only the costs for extraordinary services and completely disregarded its finding as to the cost of normal delivery is, at the very least, subject to the criticism of the findings condemned in *United States v. Chicago, M., St. P. & P.R.R. Co.*, 294 U.S. 499 (1935), with respect to which the Court found "lurking" in the report some phrases that tended to give support to the interpretation favored by the Government, but stated that:

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requi-

site in the quasi-jurisdictional findings of an administrative agency."

That ruling should be applied here. Decision should also be guided by *United States v. Abilene & So. Ry. Co.*, 265, 274 (1924):

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void." (p. 290)

All of the foregoing, we submit, demonstrates that the Government's Motion to Affirm does not validly answer the basic contentions set forth in the Jurisdictional Statement. And nothing said in the motion answers appellants' arguments as to the importance of the questions involved (J.S. 16-22). Notwithstanding these facts, further proceedings before the Commission at this stage may substitute for plenary consideration by the Court, a matter to which we now turn.

The Government's concession that the appellants are entitled to a hearing for the introduction of cost data relevant to transportation to Hunt's Point is, of course, an important concession to one of the basic contentions advanced by appellants. If this concession had been made in the court below, the order of the three-judge court may well have been quite different than that entered.

More than this concession, however, is required for the proper protection of appellants' rights. If the hearing for the reception of evidence of the cost of serving Hunt's Point were to be limited to a consideration of Hunt's Point alone (in relation to the New Jersey Points), appellants would not be assured of the right to a real and substantial consideration of the effect which should be given to transportation costs in determining upon rates to Hunt's Point. This is because it would unquestionably be argued that the Commission has already found that the rates to all New

York City points presently served shall be the same as to the New Jersey points involved, and that with this finding standing (as it would stand with an affirmance of the lower court's decision) Hunt's Point should not be singled out as the lone place in New York City having rates higher than those applicable to the group in general.

Since, under the Commission's theory of decision (the necessity for rate equality in the selection of a location for the new produce market) it is Hunt's Point which has proved to be the crucial place, the Commission's finding of undue prejudice to the miscellaneous stations in New York (which have proved to be of no consequence, none having been selected as the location for the new produce terminal) should not be permitted to render superficial and insubstantial its consideration of the costs and rates to Hunt's Point in relation to the New Jersey points involved. The consideration of the rates to the important new produce terminal, therefore, should be made with the entire rate adjustment to the New York area before the Commission.

Accordingly, in the light of the concession made by the Government and the relation thereof to the Commission's theory of decision, appellants respectfully suggest that the Court forthwith enter an order vacating the judgment of the three-judge court, with directions to remand the case to the Commission for further hearing and a finding of the comparative cost as between transportation to Hunt's Point (and any other relevant New York points) and the destinations alleged to be unduly preferred, and a determination of the lawfulness of rate relations as between Hunt's Point and other New York points, on the one hand, and New Jersey points, on the other. In the alternative, appellants respectfully request that probable jurisdiction be noted so that plenary consideration may be given to the questions presented in the jurisdictional statement.

II. The Motion of the New York Port Authority and New York City.

This motion puts much emphasis upon the traditional maintenance of rate groups at large cities, such as New York. However, the fact that stations have been grouped as to rates in general does not mean that variations with respect to rates on given commodities, such as fruits and vegetables, moving on exceedingly low rates, result in undue prejudice and preference in violation of Section 3(1) or that in determining whether they do so result, basic requirements for establishing a violation of Section 3(1) may be disregarded. (See J.S. 19.)

It is a common thing to have exceptions to the general practice of maintaining terminal group rates. The evidence shows examples of such exceptions at New York as well as at terminal groups of other cities (Tr. 314-323, Exs. 55, 56). In publishing the assailed rates on fruits and vegetables to New York, the railroads did not suggest a general departure from the practice of maintaining a common rate to the New York group. They simply filed an additional exception, and they did so because of the very low level of the rates involved. This was specifically approved by the shippers and receivers of the fruits and vegetables, those truly concerned with the rates.

These appellees do not relate their discussion of the group matter to the legal deficiencies in the Commission's order as raised in the Jurisdictional Statement.[3] They

3. It is said on page 8 of the Port Authority Motion that the Commission found that the rate differential could cause the removal of the "wholesale trade" from New York to New Jersey, that the wholesale trade is sometimes referred to in the Commission's report as the "wholesale market" and that this is not an organization over which the City of New York has any control. The Commission referred to "the decision" as to relocation of "the wholesale produce market" (J.S. 48a). Also, the author of the majority report, in his dissent to the division report, spoke of "the produce terminal" and said that:

> "A new produce market is only one of many *facilities* that may require community planning . . . and a huge investment

state that all pertinent principles of law have been settled by the decisions cited on pages 10 and 11 of their motion. One of these, *Baltimore & Ohio R. Co. v. United States,* 345 U.S. 146 is not pertinent. It dealt with reasonableness and not undue prejudice. The lower court sustained the order involved in the present case on the Commission's finding of undue prejudice alone (J.S. 8a).

Each of the other cases cited on pages 10 and 11 of the New York Motion did deal with undue prejudice, and each of the Commission's orders reviewed in those cases was supported by the finding of similarity of transportation conditions which is lacking in the order now under review. We have already noted this (*supra,* p. 3) as to *Ayrshire.* The next case cited is *Illinois Commerce Commission v. United States,* 292 U.S. 474. In that opinion the Court stated at page 482:

> ". . . the Commission found that the transportation conditions throughout the Chicago Switching District are substantially similar; that they are no more favorable to interstate movements than to intrastate movements within the District. . . ."

The next decision cited is *Virginian Railway v. United States,* 272 U.S. 658. In that case 45 mines on the Virginian Railway had the group rate to the West. The remaining 54 mines on the Virginian had rates so high as to be characterized by Virginian's counsel as "impossible" (98 I.C.C. 488, 491). At page 665 the Court said:

> "These 45 mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the 54 mines, *found to be similarly situated,* to which the market is closed. And the Commission has

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secured in part by public credit. The location of such *facilities* is not decided by happenstance . . . ." (J.S. 24a, italics added.) It is clear that the concept of "wholesale trade" is counsel's, not the Commission's.

found that the preference is unjust. In essence, the situation is the same as that considered in *United States v. Illinois Central R.R.*, 263 U.S. 515, 523, and *United States v. Pennsylvania R.R.*, 266 U.S. 191, 199." (Italics supplied.)

And at page 666:

"It was shown that a huge coal traffic moves from this territory, *under like operating conditions*, at the blanket rates which were voluntarily established by other carriers to serve mines similarly located." (Italics supplied.)

In the final case in appellees' list, *New York v. United States*, 331 U.S. 284, wherein the Commission had found that rates in general between the North and the South, higher in level than those within the North, were unduly prejudicial to the South, the Court stated, at page 315:

"Fifth. The Commission found that conditions peculiar to the respective territories did not justify the differences in the territorial class-rate structures. In reaching that conclusion it first inquired whether the differences in the costs of furnishing the railroad service in the several rate territories justified the existing differences in the levels and patterns of the class rate scales. The basis of its inquiry was a cost study submitted by its staff."

The Commission's conclusion was that there was little significant difference in the cost of furnishing transportation in the South as compared with the East (p. 322).

The New York appellees do not argue that the Commission, in the case now under review, made a finding similar to that made in the foregoing cases. Rather, they contend that the transportation is for very long hauls and that it is identical except as to terminal services in serving

New York as compared with New Jersey points.[4] Terminal operations are always very expensive. They have increased by 439% since the beginning of the period of inflation which started with World War II, while line-haul rates have increased only 91% (Exhibit 68). When rates are cut to the bone in an effort to recapture business lost to competing forms of transportation—as were the rates here involved—these terminal cost differences obviously have great significance to the lines which incur them and to their ability to meet competition by rate reduction. The Commission does not know what the costs are to the new produce terminal and, as shown above in response to the Government motion, its findings with respect to the costs in effecting delivery at the Pennsylvania Produce Terminal in Manhattan are fatally defective.

The Port Authority also states that appellants' argument as to the necessity for finding substantial similarity of transportation conditions amounts to a contention that the Commission may not require rate uniformity within a group where "any" variation of costs is shown in serving different stations. This argument has not been made by appellants. It is erected by these appellees to be knocked down by them. Appellants argue that *substantial* variations in costs may be reflected in rates, especially when the rates are on extremely low levels. They say also that, at the very least, the Commission should know what the cost

4. Appellees say (p. 3) that the complaint named 396 railroads as defendants (all but a few having no connection with the rates involved) that the Southern and Western lines took no part in the proceedings and that New York Central and Erie favored uniform rates. Southern and Western lines have no substantial interest in the substance of the complaint, the matter of equality as between New York and New Jersey. As is customary, they left the defense to the lines having the real interest. Central and Erie have little interest, if any, from the South, as to which the Pennsylvania is virtually the exclusive carrier (Tr. 381, 633, 634). Moreover, the position of these two roads may well have been dictated by their position in the port differential controversy in which it would have been against their interests, as lines predominantly serving New York, among the Ports, to have shown their high costs in New York harbor.

difference is before it orders the railroads to waive it. It does not know that cost as to the point which controlled its decision, the place at which the new produce terminal might be located, now known to be Hunt's Point.[5]

These appellees say that appellants contend that the complainants before the Commission had the burden of showing the costs involved in serving the 24 stations in New York City other than the Pennsylvania Produce Terminal and they refer, in support of that assertion, to page 14 of the Jurisdictional Statement. A reference to that page will show that no such contention has been made by appellants. They argued that the complainants before the Commission offered no evidence to prove competition or injury from the rate relation, with respect to the 24 miscellaneous stations and that, therefore, an obligation to show costs with respect to those stations never arose.[6]

New York appellees (p. 14) answer appellants' argument concerning the Commission's having acted without evidence in dividing the station costs between those for nor-

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5. The "chaotic rate situation" and the "impractical and unworkable rate structure" envisioned by appellees (Motion, p. 13) has no relation to the present case. Here the rates were agreed upon by the people who use them, the shippers and receivers of freight and the railroads. There is no evidence that they have found them to be in any respect impractical or unworkable.

6. The Port Authority endeavors to show (p. 7) the traffic importance of the 24 miscellaneous stations in "New York City" by reference to a finding that 1100 cars of vegetables subject to the $57 differential were delivered at stations "east of the Hudson River other than the piers" and another unsupported statement of the Commission. The $57 per car differential applies to many stations "east of the Hudson River" which are not in New York City. The Pennsylvania, which is substantially the only terminating railroad from the South to New York (Tr. 381, 633, 634), in practice delivers perishables in New York only at the piers, its produce terminal (Tr. 385). From the Southwest, the $57 differential does not apply at stations in New York other than the piers (Tr. 71-72). It is difficult to see, therefore, how vegetables in substantial volume and subject to differentially higher rates could be delivered to New York stations other than the piers from the origin territories the rates from which are in issue in this case.

mal services and those for extraordinary services by stating that the Commission might have rejected, "as did the Hearing Examiner," the railroads' cost showing on the ground that their figures failed to show "the necessary separation" as between costs of ordinary station services and extraordinary, and that instead of rejecting them as "flawed and unacceptable," the Commission, "in the interest of the railroads themselves," analyzed the "faulty figures" and developed accessorial costs. This attempt to excuse the Commission's having acted without evidence will not bear scrutiny. The Examiner had held that the railroads' evidence of station costs at the P.R.R. produce terminal covered services "not properly includible in the line-haul rate" (J.S. 37a). If this was correct, obviously the figures were faulty. But the entire Commission specifically held that the Examiner was not correct:

> "Contrary to the view expressed in the recommended report, it is not unlawful for the defendants to publish tariffs which extend to shippers, under the line-haul rate or charge, pier services and facilities which are accessorial in character. In this connection, section 6(1) of the Interstate Commerce Act provides that tariffs 'shall also state separately all terminal charges * * * and all other charges which the Commission may require.' In other words, there is no requirement that all such charges must be separately stated, but only such as 'the Commission may require.' In a number of proceedings, the Commission has refused to require the separate statement of accessorial charges. See, for example, *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21." (J.S. 38a)

Obviously, therefore, the appellees point that the railroads were required to and failed to make a separation of the costs, and that the Commission generously did it for them, is incorrect.

These appellees also state (p. 15) that the Commission authorized the railroads to recover $36.82 of the costs at the produce terminal by a new charge, and they again refer to the fragmentary cost difference of $14.14 as if it were the only remaining cost difference disregarded by the Commission; but it is not, as was pointed out in discussing the Government's motion (*supra*, pp. 6-7). Moreover, the establishment of an accessorial charge at the produce terminal would have no relation to the matter of securing proper compensation for transportation to Hunt's Point.

It is urged, without relevance to the issues raised, that the Commission's order permits the railroads to establish equality by increasing the rates to the New Jersey destinations. As the Commission found, the present charges "were established to enable the defendant carriers to regain traffic from unregulated motor carriers . . ." (J.S. 32a). And as the lower court pointed out, ". . . the record does not show how much rates can be increased without undue injury to the competitive position of rail shipment in relation to trucking." (J.S. 6a) The Florida interests, in their brief before the Commission, stated that:

> "The rail rates to destinations generally throughout Official Territory cannot be increased, in the light of the intensive motor-truck competition. Even the present level of rates does not permit the rails to share equally in the traffic, and any increase surely would deter a free movement of the traffic by rail." (p. 23)

Nothing in the motion of the New York appellees meets the legal points presented in the Jurisdictional Statement.

III. Conclusion.

It is respectfully submitted that the Court should enter the order suggested above, at the end of the discussion of the Government's motion, that is, that the Motions to Affirm be denied and (a) the judgment of the lower court be forthwith vacated, with directions to remand the case to

the Commission for further hearing and a finding of the comparative cost as between transportation to Hunt's Point (and any other relevant New York points) and the destinations alleged to be unduly preferred, and a determination of the lawfulness of rate relations as between Hunt's Point and other New York points, on the one hand, and New Jersey points, on the other; or (b), in the alternative, that probable jurisdiction be noted and the case be set down for plenary consideration by the Court.

Respectfully submitted,

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